

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
MINE SAFETY HEALTH ADMINISTRATION)
PUBLIC HEARING)
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IN THE MINE SAFETY HEALTH ADMINISTRATION

MINE SAFETY HEALTH ADMINISTRATION)
)
PUBLIC HEARING)
)

Room 400N
800 K Street, N.W.
Washington, D.C.

Thursday,
December 14, 2000

The parties met, pursuant to the notice, at
9:00 a.m.

BEFORE: MARVIN W. NICHOLS
Chairman

APPEARANCES:

MARVIN W. NICHOLS, Administrator
Coal Mine Safety and Health
EARNEST C. TEASTER, Administrator
Metal and Non-Metal Mine Safety and Health
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Office of Standards, Regulations and Variances
DEBRAH GREEN
Office to the Solicitor
ROBERT SNASHALL
Office to the Solicitor
BRUCE WATZMAN
STEVE SANDBROOK

SPEAKERS:

ADDE ABRAMS
MARG Diesel
MICHAEL SPRINKER
ICWUC Health and Safety Department
JOSEPH MAIN, UMWA
JIM SHARP, NAA-NSA

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P R O C E E D I N G S

(9:00 a.m.)

1
2
3 MR. NICHOLS: Good morning. Can you hear me in
4 the back? Can you hear, Bob. I'm Marvin Nichols, the
5 administrator for Coal Mine Safety and Health. Welcome to
6 MSHA's public hearing on development of its final standard
7 for hazard communication. The members of today's panel are
8 Ernie Teaster on my left. On my far left is Robert Stone
9 with the Standards Office. Ernie is the administrator for
10 metal and nonmetal. On my right is Deborah Green and Bob
11 Snashall. They're with the Office of the Solicitor. And
12 Cherie Hutchinson is with the Office of Standards. And
13 Richard Feehan is with the Office of Education Development
14 and Policy.

15 We're here to listen to your comments on the
16 requirements contained in the hazard communication interim
17 final rule which MSHA published on October 3, 2000. The
18 hearing is being held in accordance with Section 101 of the
19 Federal Mine Safety and Health Act of 1977. As is the
20 practice of MSHA, formal rules of evidence will not apply.
21 Therefore, today's proceedings will be conducted in an
22 informal manner.

23 Let me briefly give you some background on the
24 rule and highlight its major provisions. On November 2,

1 1987, the United Mineworkers of America and the United
2 Steelworkers of America jointly petitioned MSHA to adopt
3 OSHA's hazard communication standard to both coal and metal
4 and nonmetal mines. They based their petition on the need
5 for miners to be better informed about chemical hazards. In
6 their petition, the union stated that miners are frequently
7 exposed to toxic and hazardous chemicals, both underground
8 and on the surface.

9 To support their petition -- to support their
10 position, the petition cited an incident in northern
11 Michigan in which miners were hospitalized after being
12 exposed to unknown flotation reagents. The petition also
13 specifically noted that work at both surface and underground
14 coal and metal and nonmetal mine exposed miners to a variety
15 of hazardous chemicals.

16 For example, the petition stated that explosives
17 contain organic nitrates that produce nitrogen oxides and
18 ammonia when detonated. Roof building systems contain
19 plastic resins and reactants. Solvents used in equipment
20 and maintenance are both toxic and flammable. And mill
21 reagents can realize hydrogen sulfide, cyanide, or other
22 dangerous chemicals.

23 In response to this petition, MSHA published an
24 advanced notice of proposed rulemaking on hazard

1 communication on March 30, 1998. In addition, in the
2 advanced notice of proposed rulemaking, we indicated that we
3 would use the OSHA hazard communication standard as the
4 basis for our standard and request the specific comments on
5 a number of related issues. We published a notice of
6 proposed rulemaking on hazard communication for the mining
7 industry on November 2, 1990. We also held three public
8 hearings in October in 1991, one each in Washington, D.C.,
9 Atlanta, Georgia, and Denver, Colorado. The record closed
10 on January 31, 1992.

11 We received a wide variety of comments on our
12 advanced notice of proposed rulemaking and proposed rule.
13 Commenters included both small and large mining companies, a
14 variety of trade associations, including those representing
15 specific minerals, state mining associations, chemical and
16 equipment manufacturers, national and local unions, a member
17 of Congress, and two federal agencies.

18 We reopened the rulemaking record on March 30,
19 1999, to receive comments on the impact of certain statutes
20 and executive orders affecting the proposed rule, including
21 ones to evaluate the impact of a regulatory action on small
22 mines; state, local, and tribal governments; and the health
23 and safety of children.

24 In addition, we requested comments on the

1 information collection and paperwork requirements of certain
2 provisions of the proposal now considered as an information
3 collection burden under the expanded definition of
4 "information" under the Paperwork Reduction Act of 1995.

5 Most MSHA regulations do not require an evaluation
6 of their impact on the environment. However, health
7 standards do. This was brought to our attention, and we
8 took the opportunity to remedy the oversight by also
9 requesting comments on the effect of the proposed rule on
10 the environment. We received seven comments to the limited
11 reopening of the rulemaking record, primarily from trade
12 associations and labor organizations. The rulemaking record
13 closed on June 1, 1999.

14 On October 3, 2000, we published in the Federal
15 Register an interim final rule on hazard communication. We
16 provided the mining community with an additional opportunity
17 to comment on the new plain English format of the rule and
18 their most recent experience under OSHA's hazard
19 communication standard. We received 15 comments on our
20 interim final rule. Commenters included both small and
21 large mining companies, trade associations, labor unions,
22 miners, and a federal agency.

23 The comment period on the interim final rule
24 closed on November 17, 2000. We published our response to

1 the written comments, as well as those comments received
2 today -- excuse me. We will publish our response to the
3 written comments, as well as those comments received today
4 at this hearing and during the posthearing comment period in
5 the preamble to the permanent HazCom final rule. We will
6 consider all comments contained in the rulemaking record,
7 from the publication of the advanced notice of proposed
8 rulemaking on March 30, 1988, through the close of the
9 record on December 19, 2000, in the development of a
10 permanent final standard.

11 Our HazCom interim final rule is based primarily
12 on comments received in responses to the advanced notice of
13 proposed rulemaking, the notice of proposed rulemaking, and
14 the 1991 public hearings. We also considered the comments
15 received in response to our limited reopening of the record,
16 our experience in the mining industry, and the related
17 standards of other federal agencies.

18 To the extent practical, the requirements of the
19 HazCom interim final rule are the same as that in OSHA's
20 hazard communication standard. We developed some provisions
21 to be consistent with other MSHA standards, such as the
22 retention period for training records. Two areas where our
23 standard differs from OSHA's are in the inclusion of
24 hazardous waste among the chemicals of concern and the

1 omission of a requirement to label products going off mine
2 property. OSHA's hazard communication standard exempts
3 certain hazardous wastes and hazardous waste operations
4 because they have employee protections to address these
5 situations in other OSHA rules. Because we do not have
6 standards that address these situations, we needed to ensure
7 that miners working with hazardous waste understand the
8 associated hazards and know to take precautions.

9 The HazCom interim final rule is an information
10 and training standard. It requires mine operators to know
11 about the chemicals at their mines and to inform miners
12 about the risks associated with exposure to hazardous
13 chemicals, the methods implemented at the mine to control
14 exposures, and safety measures. The HazCom interim final
15 rule does not restrict chemical use, require controls, or
16 set exposure limits. Also, the standard does not require
17 operators to label products that go to downstream users off
18 mine property.

19 Finally, the HazCom interim final rule does not
20 require mine operators to have an independent training
21 program separate from Parts 46 and 48 training. Under the
22 HazCom interim final rule, mine operators have the
23 flexibility of combining the training requirements with
24 existing Part 46 and Part 48 training, as well as OSHA's

1 hazard communication standard.

2 In the near future, MSHA will be publishing a
3 compliance guide to help operators and miners understand the
4 application of the permanent HazCom final regulation. MSHA
5 is also planning to develop a variety of compliance aids,
6 including a HazCom toolbox, with several examples of a
7 written HazCom program. Mine operators can adapt the
8 program developed to meet OSHA's hazard communication
9 standard because the two standards have very similar
10 requirements. Mine operators may also obtain assistance
11 from organizations that have developed generic guides to
12 meet OSHA's hazard communication standard. MSHA will also
13 make available the names, mailing addresses, and web site
14 addresses of several organizations which have developed a
15 variety of generic HazCom materials.

16 Now let me briefly highlight the six major
17 provisions of the rule.

18 1. Hazard determination. The HazCom interim
19 final rule requires mine operators to identify the chemicals
20 at their mine and determine if they present a physical or
21 health hazard to miners based on the chemical's label and
22 material safety data sheet. Mine operators must review
23 scientific evidence to determine if the chemical is
24 hazardous.

1 2. The HazCom program. The HazCom interim final
2 rule requires mine operators to develop, implement, and
3 maintain a written comprehensive plan to formalize a HazCom
4 program. The program must include provisions for container
5 labeling, collection, and availability of MSDSs, and
6 training of miners. It also must contain a list of the
7 hazardous chemicals known to be present at the mine and how
8 mine operators will inform miners of the hazards of
9 nonroutine tasks and of chemicals in unlabeled pipes and
10 containers. If the mine has more than one operator, or has
11 an independent contractor onsite, the HazCom program must
12 also describe how the mine operator will inform the other
13 operators about the chemical hazards and protective measures
14 needed.

15 3. Container labeling. A label is an immediate
16 warning about a chemical's most serious hazards. The HazCom
17 interim final rule requires mine operators to ensure that
18 containers of hazardous chemicals are marked, tagged, or
19 labeled with the identity of the hazardous chemical and
20 appropriate hazard warnings. The label must be in English
21 and prominently displayed. The standard does not require
22 mine operators to label mine products that go off mine
23 property. However, operators must provide the information
24 if a customer asks for it.

1 4. Material safety data sheet. A chemical's MSDS
2 provides comprehensive technical and emergency information.
3 It serves as a reference document for operators, exposed
4 miners, health professionals providing services to those
5 miners, and firefighters or other public safety workers.
6 The HazCom interim final rule requires mine operators to
7 have an MSDS for each hazardous chemical at the mine. The
8 MSDS must be accessible in the work area where the chemical
9 is present or in a central location immediately accessible
10 to miners in an emergency. Mine operators should already
11 have MSDS sheets that were provided by the supplier of those
12 chemicals brought onto mine property.

13 5. HazCom training. The HazCom interim final
14 rule requires mine operators to establish a training program
15 to ensure that miners understand the hazards of each
16 chemical in their work area, the information on the MSDSs
17 and labels, how to access this information when needed, and
18 what measures they can take to protect themselves from
19 harmful exposure. Mine operators may already cover some of
20 the above information in their current training program. If
21 so, they do not have to retrain miners in topics they have
22 already been trained in. Consequently, the mine operator
23 should have no problem incorporating any additional
24 training.

1 6. Making HazCom information available. The
2 HazCom interim final rule requires mine operators to provide
3 miners, their designated representatives, MSHA, and NIOSH
4 with access to materials that are part of the HazCom
5 program. These include the HazCom program, the list of
6 hazardous chemicals, labeling information, MSDSs, training
7 materials, and any other material associated with the HazCom
8 program. Mine operators do not have to disclose the
9 identity of a trade secret chemical except when there is a
10 compelling medical or occupational health need.

11 In closing, two commenters requested a public
12 hearing on the interim final rule. The purpose of this
13 hearing, as the public hearing notice stated, is to receive
14 additional comments on the recently published HazCom interim
15 final rule. The hearing is scheduled to end at 5 o'clock
16 today. But if need be, we could go longer. It all depends
17 on how long Adele will speak.

18 (Laughter)

19 MR. NICHOLS: During the proceeding, panel members
20 may ask questions of the presenter. And a verbatim
21 transcript of the hearing is being taken, and it will be
22 made part of the official rulemaking record. The hearing
23 transcript, along with all of the comments and data that
24 MSHA has received to date, will be available for review by

1 the public. And, of course, the entire rulemaking record is
2 available at our office in Arlington, Virginia.

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

6 We will also accept additional written comments
7 and other appropriate data on this final rulemaking from any
8 interested party, including those who do not present oral
9 statements. Written comments may be submitted to me during
10 the hearing or sent to the address listed in the hearing
11 notice. All written comments and data submitted to MSHA,
12 including that submitted to me today, will be included in
13 the rulemaking record. The record will remain open until
14 December 19, 2000, for the submission of posthearing
15 comments. And we also have an attendance sheet that is
16 available here today for presenters to sign in.

17 Again, to allow for the submission of posthearing
18 comments, the record will remain open until December 19,
19 2000.

20 We will begin with the folks that have signed up
21 to do presentations. But at the end of that, anyone in the
22 audience that wants to come up and make a statement will be
23 able to do that.

24 So the first person on the signup sheet is Adele

1 Abrams with MARG Diesel. So, Adele, come on up.

2 MS. ABRAMS: Good morning. I'm pleased to be here
3 this morning on behalf of the MARG Diesel Coalition to
4 submit additional comments and testimony concerning MSHA's
5 interim final rule establishing a hazard communications
6 standard for coal and metal/nonmetal mining. And as noted
7 by our moderator, this rule was published on October 3,
8 2000.

9 MARG previously submitted written comments in
10 response on November 17, 2000. And those comments, MARG
11 requested a public hearing. However, we were deeply
12 disappointed that MSHA chose to provide less than one week
13 of official notice for this hearing, which prevented the
14 members of the MARG coalition, who live largely in the
15 western states, from participating at this hearing. And it
16 also prevented a meaningful time to prepare for the hearing.
17 Moreover, we're stunned to learn that MSHA is providing only
18 three working days for preparation of written posthearing
19 comments, with the comment period closing just days before
20 Christmas.

21 It is unfortunate that MSHA is not truly
22 interested in providing the opportunity for a full and fair
23 hearing on this critical rulemaking initiative, but it
24 appears motivated by a desire to rush this to final

1 publication before the change in agency administration. It
2 is also curious why the agency feels compelled to
3 shortchange the rulemaking comment process when it waited a
4 full decade between publication of the proposed rule and
5 publication of the so-called interim final rule in October
6 2000. If the need for the standard is so urgent as to
7 require this unprecedented short notice, then why did the
8 agency wait ten years to bring it to a culmination?

9 As we noted in our written comments, MARG is a
10 coalition of mining companies involved with metal and
11 nonmetal mining, and its operations are under MSHA's
12 jurisdiction. MARG is particularly interested in this rule
13 because of its requirements concerning diesel equipment and
14 its incorporation by reference of standards established by
15 the American Conference of Governmental Industrial
16 Hygienists, ACGIH, and the findings of the International
17 Agency for Research on Cancer, or IARC.

18 Several members of MARG and other organizations
19 have recently filed suit challenging the interim final rule
20 because of its procedural deficiencies, in appropriate and
21 unjustified content, and its improper delegation of
22 rulemaking authority. And MARG does agree with those
23 positions, as I'll be explaining further.

24 MARG members do support the reduction of

1 accidents, injuries, and illnesses at mines through
2 proactive safety and health programs and compliance with
3 standards that are supported by sound science. However,
4 after careful review, we have concluded that MSHA's interim
5 final rule establishing a HazCom standard for the mining
6 industry is procedurally and substantively flawed, and it
7 must be withdrawn.

8 MSHA's interim final rule is characterized by the
9 agency as both a safety standard and a health standard,
10 promulgated under the authority of Section 101 of the Mine
11 Act. But MSHA has clearly failed to demonstrate the need
12 for a HazCom standard. By purposeful omission of relevant
13 statistical trends, which actually show decreasing injuries
14 and illnesses due to chemical hazards in mining, MSHA has
15 sidestepped the benefit question and simply provides
16 misleading total chemical hazard related illnesses and
17 injuries for two periods of time: 1983-1999 and 1990-1999.
18 MSHA has also failed to distinguish those illnesses and
19 injuries which would have been prevented if existing MSHA
20 regulations, such as Part 46 or Part 48 training, labeling,
21 or the use of appropriate personal protective equipment, had
22 not been violated. Both of the MSHA examples used in the
23 interim final rule do, in fact, relate to violations of
24 existing standards.

1 Ironically, MSHA emphasizes the agency's frequent
2 presence on mine properties and admits that all operations
3 comply at present with some of the proposed HazCom rule's
4 requirements. Yet MSHA appears unable to provide accurate
5 data on how many mines already have an effective HazCom
6 program in place, nor how many injuries or illnesses have
7 actually been prevented by such programs alone, as
8 distinguished from the benefits provided by Part 46 and Part
9 48 training. Significantly, MSHA's projections of future
10 accidents and illnesses cannot be evaluated or verified
11 because MSHA has not provided the necessary contextual data
12 or accurate incidence trends.

13 MARG believes that a separate HazCom standard is
14 not needed for the mining industry because current MSHA
15 standards provide adequately for employee training on
16 hazards, as well as container labeling and product safety
17 information. MSHA has failed to adequately articulate a
18 significant risk that exists in the absence of a separate
19 HazCom standard, a risk that could not be reduced or
20 eliminated by full enforcement of their existing standards.

21 The interim final rule will impose unnecessary
22 costs on the mining industry without any commensurate safety
23 enhancement. MSHA has dramatically underestimated the
24 economic impact on mining from this rule, and its regulatory

1 economic analysis is fatally flawed, and it is in violation
2 of the Regulatory Flexibility Act and its SBREFA amendments.
3 MSHA states that mine operators will be able to use off-the-
4 shelf materials and programs developed for the OSHA HazCom
5 programs, but the MSHA standard differs significantly from
6 the analogous OSHA rule, and it differs to such an extent
7 that utilization of general industry HazCom materials will
8 not satisfy the rule's requirements. Thus additional costs
9 will be imposed on the mining industry to develop mining
10 specific programs. And MSHA has failed to accurately
11 include such costs in its REA.

12 The rule itself is stale. It was published
13 initially in 1990, and it has been substantially altered
14 from the proposal. Thus it cannot take effect without
15 further comment, in accordance with the Mine Act and the
16 Administrative Procedure Act. MSHA has also improperly
17 relied upon the advice and recommendations of
18 nongovernmental sources, in violation of the Federal
19 Advisory Committee Act. Moreover, it improperly
20 incorporates by reference exposure limits set by private
21 sector organizations, which present mine operators with a
22 moving target for compliance and violate traditional due
23 process principles and constitutional delegation of power
24 restraints.

1 An entirely different version of the HazCom rule
2 was originally proposed in 1990. Not only was the format of
3 the rule altered, but there have also been substantive
4 changes from the proposed rule. Moreover, in the
5 intervening decade between the proposed rule and this
6 interim final rule, MSHA has promulgated additional
7 regulations, and the mining industry itself has changed.
8 Ten years is simply too long for a rule to remain
9 unpromulgated in such a rapidly changing regulatory and
10 economic environment. MSHA must offer this modified rule
11 for additional comment and review and a de novo discussion
12 of whether a HazCom rule is even needed.

13 MSHA has failed to encourage or entertain true
14 dialogue on the proposal's substantive requirements. It
15 rejected industry's request to reopen the rulemaking last
16 year. And as part of its lip service to reg flex, SBREFA,
17 and the Paperwork Reduction Act, MSHA failed to obtain the
18 necessary information concerning feasibility and economic
19 impact. It unreasonably and impermissibly minimized the
20 economic impacts on the nearly 100,000 mine sites that are
21 deemed small business entities under the definitions of the
22 U.S. Small Business Administration and its implementing
23 regulations.

24 MSHA has falsely certified that this rule is not

1 an economically significant regulatory action, and not
2 pursuant to Executive Order 12866. And MSHA has falsely
3 certified that it will not have a significant economic
4 impact on a substantial number of small mining entities. It
5 masks the true impact by ignoring whole categories of
6 expenses and by amortizing the startup costs to avoid
7 confronting the first year impact on thousands of small
8 businesses.

9 MSHA claims that the use of existing OSHA training
10 and program materials will reduce compliance costs. But as
11 noted earlier, the agency has deviated significantly from
12 OSHA's HazCom requirements, thereby rendering impossible the
13 use of such off-the-shelf materials designed for OSHA
14 operations.

15 MSHA has estimated the annual economic impact on
16 mines at an incredibly low \$270 per year per mine. The cost
17 to maintain MSDSs alone will be significantly higher than
18 that, and the labeling, training, and recordkeeping
19 requirements will add more costs, especially if MSHA does
20 not better integrate the requirements of HazCom with those
21 of Parts 46 and 48. Compliance will be a significant
22 challenge for many mines, especially small mines, and
23 especially mines where contractors perform significant
24 portions of work.

1 The interim final rule is procedurally deficient
2 because MSHA either failed to give notice of and an
3 opportunity to comment on the provisions actually adopted or
4 because the agency failed to take into consideration
5 comments submitted in response to the proposed rule. The
6 secretary blatantly failed to consider these comments, in
7 violation of the APA. MSHA's adoption of entirely new
8 proposals, and even old proposals in a different format,
9 defeats attempts at comparison with the proposal and it
10 negates the ability of the interim final rule to be a
11 logical outgrowth of the proposed rule. Thus, it should
12 have properly been issued as a proposed rule for a second
13 round of comments.

14 MSHA fails to articulate a significant risk
15 resulting from current policy, nor a benefit to be derived
16 from the proposed addition of this standard to the
17 secretary's existing arsenal of enforcement weapons. Under
18 the Mine Act, the secretary has authority to develop,
19 promulgate, and revise as may be appropriate improved
20 mandatory health or safety standards for the protection of
21 life and prevention of injuries in coal or other mines.
22 However, the data upon which this rule's purported risk
23 assessment is based spans 16 years ending in June 1999, and
24 this ignores completely any preventive effect of MSHA's new

1 Part 46 training standard, which covers 10,000 surface
2 nonmetal mines, and which only took effect on October 2nd,
3 the day before this interim final rule was published.

4 Section 101(a) of the Mine Act requires the
5 secretary to demonstrate that the old standard or current
6 conditions present significant risks and that the new
7 standard will produce substantial benefit and be feasible.
8 The secretary has simply failed to satisfy this burden.

9 Although MARG will not repeat in its entirety the
10 specific concerns articulated in our written comments, I do
11 wish to stress a few fatal flaws in this rule. First of
12 all, MARG opposes MSHA's inclusion of hazardous wastes
13 regulated by EPA in the HazCom rule. This is a significant
14 departure from the OSHA HazCom standard that will make it
15 impossible for mine operators to use off-the-shelf
16 materials. Moreover, such coverage is wholly unwarranted
17 because hazardous wastes are already subject to extensive
18 regulations at mines imposed by the EPA, including
19 manifesting requirements, handling, labeling, training, and
20 disposal requirements. There is simply no justification for
21 adding a second layer of duplicative regulation enforceable
22 by MSHA.

23 Second, MSHA should reverse its decision not to
24 exempt basic minerals and dusts from the HazCom rule. These

1 materials are not chemicals in the normal sense of the word,
2 but they are natural ore bodies, and they are fully
3 addressed in MSHA's mandatory training requirements under
4 Part 46 and Part 48. It is absurd to imagine miners
5 consulting in MSDS for the natural minerals that they are
6 extracting, such as salt, stone, and trona. Extension of
7 the MSDS requirements to such basic mining minerals
8 represents a superfluous, unjustified regulatory
9 requirement, and it must be eliminated from the final rule.

10 Third, MARG strongly objects to MSHA's use of
11 nongovernmental sources, particularly ACGIH and IARC, to
12 determine whether particular chemicals are hazardous and
13 what the level of hazard is. As MSHA recognizes in its
14 preamble, these organizations do not use the equivalent of
15 federal notice and comment rulemaking to make their
16 determinations. And a number of their determinations
17 directly applicable to the mining industry remain highly
18 controversial or have been negated by more recent scientific
19 findings, such as the IARC finding for crystalline silica.

20 Moreover, since MSHA will require mine operators
21 to train their employees using MSDSs that list the "latest"
22 ACGIH findings, MSHA is effectively doing a back door air
23 contaminants rulemaking. They are implementing ACGIH
24 threshold limit values that have never been subject to any

1 MSHA notice and comment rulemaking. And these are the very
2 same TLVs that the U.S. Court of Appeals prohibited OSHA
3 from adopting en masse without engaging in substance-
4 specific risk analysis, in the AFL-CIO v. OSHA case, 1992.

5 Thus, both the listing and the training
6 requirements associated with the ACGIH TLVs are an invalid
7 delegation of rulemaking authority to a nongovernmental
8 agency. And I might add that MSHA is also relying upon this
9 in the role of a federal advisory committee without
10 complying with the backup requirements. MSHA cannot legally
11 present mine operators with such a moving target for
12 compliance, nor can it delegate its rulemaking authority.
13 Such incorporation by reference is simply not permissible
14 under the Mine Act, the APA, and basic constitutional
15 principles.

16 In conclusion, promulgation of this rule as an
17 interim final is procedurally improper, arbitrary, and
18 capricious, and it must be withdrawn. If MSHA is determined
19 to proceed with this rulemaking, then additional time must
20 be provided for hearings in other parts of the country and
21 also supplemental comments, more than a three day
22 posthearing comment period, so that members of the mining
23 community will have a meaningful opportunity to testify.
24 MARG urges MSHA to withdraw this flawed standard and to

1 consider the Mine Act's mandates over political expediency.

2 Thank you.

3 MR. NICHOLS: Thank you, Adele. You talk about
4 this short post-comment period. If you look at the history
5 of the rule, this has been a topic of discussion and
6 consideration with MSHA and the mining community for about
7 12 years. We had proposed rules, public hearings, a
8 reopening of the record for limited purposes, and now this
9 proposed rule, proposed final interim rule. Can you imagine
10 any new issues that could be addressed after this long
11 record of rulemaking and comments we have already had?

12 MS. ABRAMS: Well, yes, sir, I can. For starters,
13 the benefits of the newly enacted Part 46 training. At the
14 time that I testified before you all back in 1991, in
15 Atlanta if I recall, one of the perceived benefits of this
16 rule was to bring training to the many stone, sand, and
17 gravel operations at which MSHA was prohibited from
18 enforcing training. That landscape has changed today, and
19 all of those miners are already provided with thorough
20 hazard recognition training, which includes, as I think OSHA
21 recognizes, many of the elements that would be codified
22 separately here.

23 It seems like this rule is just putting forth an
24 opportunity to write dual citations for perhaps the same

1 training violation. Another thing that has changed -- and
2 this is critical. It is not brought up in MARG's testimony,
3 but it is noted in the testimony of the American Society of
4 Safety Engineers. The federal government is now involved in
5 a total review of its hazardous communication requirements
6 as part of a global harmonization program. Jennifer Silk
7 (phonetic) at OSHA is leading the effort on this, along with
8 Mary Frances Lowe (phonetic) at the EPA. And as a result,
9 it is totally inappropriate for MSHA to be going off in its
10 direction now promulgating a HazCom which may, if it is in
11 fact going to mirror OSHA's, may be subject to change within
12 the next two or three years as OSHA agrees to get into a
13 global harmonization system along with the rest of the
14 world.

15 You know, we live in a global economy. And MSDSs
16 and labeling requirements will have to be changed. Training
17 will have to be changed. All of that should have been
18 considered and could not possibly have been considered
19 during the original comment period back in 1990 and '91.

20 And finally, with respect to the incorporation by
21 reference of the ACGIH TLVs, at the time this rule was
22 proposed, and at the time the original hearings were held on
23 this, that decision of the Eleventh Circuit in the AFL-CIO
24 v. OSHA case had not yet been rendered. Personally, I

1 believe that if OSHA had proposed its HazCom standard after
2 that decision, it itself would not have been able to
3 incorporate use of the ACGIH references on MSDSs. But MSHA
4 now is not starting with a clean slate, and it must operate
5 within the existing legal environment.

6 It is inappropriate to delegate authority to these
7 nongovernmental bodies. And the participation of MSHA and
8 OSHA personnel on those so-called consensus organizations
9 turns that into something akin to a federal advisory
10 committee.

11 These are all things that the agency needs to look
12 at, should have looked at. And these are things which
13 warrant opening this up for a republication as a proposed
14 rule with not a truncated comment period such as has been
15 offered here.

16 MR. NICHOLS: Well, we have looked at a number of
17 those issues. You talk about Part 46 training. In the
18 preamble, we talk about, well, the period 1990 through 1999.
19 There was in excess of 2,000 chemical burns. I think about
20 half of those were lost time injuries. And in that same
21 data, there was over 400 poisonings. Now if you set -- and
22 the leading area was bituminous coal operators.

23 Now coal mine safety and health has had Part 48
24 training since 1978. And the metal industry has had Part 48

1 training since 1978. That training alone is not getting the
2 job done, as evidenced by those more than 2,500 chemical
3 accidents. So the agency believes we need a regulation that
4 focuses on chemical hazards.

5 MS. ABRAMS: If I might, though, you noted in your
6 opening remarks that a separate training program would not
7 be necessary, and that the training under HazCom can be
8 provided as part of Part 46 and 48.

9 MR. NICHOLS: They can.

10 MS. ABRAMS: I would suggest that if chemical
11 burns are happening because of inadequate hazard recognition
12 training under Part 48, that that is a citable condition now
13 under Part 48, and that an additional rule is not needed.
14 There are extensive training requirements, and they are
15 supposed to cover this. Personal protective equipment is
16 supposed to be provided to workers where there is an
17 opportunity for exposure to things like chemical substances
18 or poisons.

19 There are labeling requirements already in effect
20 under other MSHA standards. If there are no labels that
21 warn of the hazards, that is a citable offense. If the PPE
22 is not provided or if it is provided and not worn under the
23 strict liability nature of the Mine Act, that is a citable
24 offense.

1 Again, it seems like this is superfluous. And I
2 know MSHA's original -- and I don't have the exact
3 reference, but it was in our earlier comments. There was a
4 memorandum MSHA put out around the time that OSHA
5 promulgated its HazCom standard where the agency itself
6 recited that a HazCom standard for the mining industry was
7 not needed because of the litany of existing standards. And
8 these include the ones I have just enumerated.

9 Nothing has changed. None of those standards have
10 been rescinded. All of those are still on the books and can
11 be implemented. And you had a new tool added, namely the
12 Part 46 training, to cover the remaining sectors of the
13 mining industry, including construction workers. There is
14 not a single person at a mine site today who is not required
15 to have hazard training.

16 MS. GREEN: Adele, I need to respond to one point
17 that you made that is incorrect, and that is that the agency
18 did not go on record as saying that an MSHA hazard
19 communication standard was not needed. The agency stated
20 that the OSHA standard did not apply to the MSHA operations.
21 It was a 4B1 issue under the OSHA Act. The agency went on
22 to say subsequently in its advanced notice of proposed
23 rulemaking that the MSHA needed a comprehensive hazard
24 communications standard comparable to that of MSHA.

1 We realize that we have the generic MSHA
2 comparable to OSHA. We realize that we have the generic
3 training regulations. But those regulations do not require
4 mine operators to specifically cover areas as the hazard
5 communication standard does in the training program. And
6 those are areas we feel are very significant and will help
7 inform miners and help mine operators to be aware of some
8 chemical hazards or chemical hazards that are associated
9 with the products that they use and could possibly prevent
10 that.

11 We realize we have substantive regulations. But
12 when it comes to training, this standard offers specific
13 training requirements that do not currently now exist, or
14 you are not required to do presently, but you could
15 incorporate those into those Parts 46 and Part 48 programs.

16 MS. ABRAMS: If that is the case, then I would
17 suggest once again that the cost estimate for this rule is
18 substantially flawed. I know of no person who can come in
19 and train at a mine on the supplemental issues that Ms.
20 Green just referenced for \$270 a year. And as a practical
21 matter, the information that appears MSHA would like covered
22 is so technically complex that inhouse people at a mine are
23 not going to be capable of providing that level of
24 instruction. It is going to require the use of safety

1 professionals or industrial hygienists who are hired in as
2 consultants to the mines.

3 MR. NICHOLS: Well, I don't think we agree with
4 that as a broad brush for the whole mining industry. But
5 try to help us understand a bit more of the burden of this
6 rule. To me, it requires mine operators to pull together
7 information that they already have. They should already
8 have these material safety data sheets. So that information
9 is available to them. Pull that together in a written
10 program. Be sure that the labels that were provided for
11 chemicals brought on mine property are still maintained,
12 maybe develop a few new ones if that is needed. But then
13 train the miners on the potential hazard for chemicals that
14 are on mine property. And as we have already said, that can
15 be incorporated into the training you already do, and with
16 the delayed implementation that you would probably get it
17 right into the first cycle.

18 So some of the burden escapes me, unless there is
19 something I'm missing here.

20 MS. ABRAMS: Well, you know, frankly the training
21 in some ways is the easiest part of this to deal with
22 because most mines do have some sort of -- or they should
23 have some training infrastructure in place. The paperwork
24 burden is going to be the real bear of this. As you know,

1 I'm sure, the HazCom standard is OSHA's most often cited
2 standard because of paperwork. You say that this should be
3 stuff that the mines already have on site. But that isn't
4 necessarily the case, simply because there has been no
5 HazCom standard, so there has not been perhaps the MSDS
6 retention or the focus on it that there would be at OSHA
7 regulated sites.

8 MSHA makes something of an assumption in its
9 proposed rule that many of the companies are already doing
10 this because they also have OSHA regulated enterprises. But
11 that is not the case for thousands of small mining companies
12 around the country. The larger companies certainly have
13 these programs in place, but the small mine operators, the
14 ones that I deal with on a regular basis, do not. Keeping
15 these systems up-to-date is certainly a burden.

16 Again, MSHA notes that a lot of this can be done
17 on computers. But if you think about it, you know, I go to
18 mines where they don't have running water, much less
19 computer systems. They don't have fax machines.

20 MR. NICHOLS: Okay. What kind of mines are those?

21 MS. ABRAMS: I can think of right in Maryland, the
22 Dimension Stone Mine. You know, if you get into the
23 outskirts of some areas, portable plants are another that
24 would not have computers onsite. You are asking for some

1 examples of problems. If you do maintain this on a
2 computer, you are going to have to allow all of the
3 contractors at your site to have access to your computer
4 systems.

5 I know that wouldn't fly where I work, and I
6 suspect that it wouldn't fly at many of these companies.
7 Just doing the inventory of chemicals is an extremely
8 burdensome job.

9 MR. NICHOLS: Well, yeah, but let --

10 MS. ABRAMS: If I need to change this every time
11 you buy a new brand of paint, and going through to examine
12 whether it differs in any substantive way so that
13 supplemental training would have to be done -- and finally,
14 MSHA appears to be requiring that every MSDS not only bear
15 the normal information that is required under the OSHA
16 HazCom standard, but that it also reflect the appropriate
17 and currently enforceable MSHA PEL, which in this case would
18 mean having to go through and by hand for each chemical
19 substance listed on there write in the 1973 ACGIH TLV for
20 metal/nonmetal and/or the 1972 ACGIH TLV if it is at a coal
21 operation because otherwise that MSDS will be incomplete,
22 which means that you cannot use one of these 800, you know,
23 fax back MSDS services because those MSDSs will not contain
24 the mandatory information as stated in your interim final

1 rule.

2 This may sound like nitpicking, but it is all
3 incremental costs that have to be considered. And, you
4 know, I'm leaving aside the whole issue of having to
5 maintain bilingual materials. There are many mines in this
6 country that have heavily Hispanic workforces. If you get
7 up into New England, you have a lot of French workforces.
8 In other parts of the country, you have Cambodians. You
9 have Chinese. There simply are not off-the-shelf training
10 materials in all of these languages.

11 So that is going to require bringing in
12 translators, or at a minimum consultants who could train in
13 the native languages of these workers. And they do see this
14 happening on the OSHA side of things as well. It is very
15 cost expensive.

16 MR. NICHOLS: Okay. Let's go back to that small
17 rock quarry you represent. And the makeup of the mining
18 industry, especially metal and nonmetal, probably 75 or 80
19 percent operations with five employees or less, and then
20 you'll have another 10 or 15 percent with 30 employees or
21 so, and then you'll have a few of the bigger operations.
22 And you said that the burden, you know, is quite a bit less
23 for the large operators.

24 Now let's look at that quarry. You have got,

1 what, a shop? And probably all of them do not have labs.
2 So you start with a pretty basic list of chemicals at the
3 mine site. You have got cleaning solvents, fuel,
4 lubrication, and maybe a few others. But that doesn't seem
5 to me like a burdensome, complicated thing to look at now.
6 Am I missing something form this rock quarry?

7 MS. ABRAMS: I haven't gone in and done an
8 inventory. But not only are they responsible for the
9 products that they have on site. They would also be
10 responsible for knowing what contractors, blasters and the
11 like, might be bringing on site and ensuring that those
12 contractors have programs in place. You know, the
13 interaction between the mine operators and contractors is
14 another dimension here that I think MSHA has largely ignored
15 in terms of its time cost and its actual costs. It is going
16 to be something of a coordination nightmare.

17 Especially at the smaller mines, you do tend to
18 have contractors coming in more for specific functions who
19 could well be bringing substances onsite. And all of their
20 workers are going to have to have HazCom training, which is
21 going to raise the cost of contracting because you are going
22 to have to require anyone coming on your site to be in full
23 compliance, not with OSHA's HazCom standard, but with MSHA's
24 HazCom standard, which does differ in substance.

1 MR. NICHOLS: Well, I mean, they are required to
2 be in compliance with other MSHA regulations now. I mean, I
3 fail to see the extra added burden here for, you know, the
4 blasting contractors you are talking about. They are going
5 to be handling explosives. There is MSDS sheets for
6 explosives. What else are they going to be --

7 MS. ABRAMS: Well, they are going to have to carry
8 an MSHA plan around with them. That's burdensome. I mean,
9 I'm not here representing the contractors, but I do
10 represent some contractors in my other practice. You know,
11 it is burdensome for them now carrying MSHA training plans
12 around with them. And this is another layer of things that
13 they have to keep in their truck, you know, and try to keep
14 things up-to-date.

15 You are going to have to be training contractors.
16 Right now, under Part 46 or 48, if a contractor is coming in
17 and they are doing a minimal amount of work there, they get
18 site specific hazard training.

19 MR. NICHOLS: And why could you not incorporate
20 HazCom training in with that?

21 MS. ABRAMS: Well, because the contractor is
22 supposed to do the HazCom training for their workers. The
23 mine operators should not be training other people's
24 workers, other than the minimal site specific hazard

1 training that is required. The contractor has the primary
2 responsibility for training his or her own employees, which
3 means those contractors have to come to that mine site
4 already in compliance with the MSHA HazCom training
5 requirements because that is a responsibility distinct from
6 the site specific hazard training under Part 48 or Part 46.

7 MR. TEASTER: But if a contractor was coming onto
8 the mine property and was going to be exposed to hazards,
9 hazardous chemicals, that was produced or used by the mine
10 operator, I believe the mine operator would be responsible
11 for providing that site specific training related to any
12 hazard, be it chemical or other.

13 MS. ABRAMS: Absolutely. I agree with you. And,
14 you know, that goes back to my point that this is already
15 covered under existing rules, so no further rule is
16 necessary. But what the mine operator is not going to be
17 covering are the hazards of the chemicals that the
18 contractor himself is bringing on. You know, if you have a
19 plumber coming on site, he may be -- or she may be bringing,
20 you know, super Drano type of products that are being used
21 not in a way that they are used by the consumer, you know,
22 or Harry Homeowner. So therefore, they require training.

23 That contractor is going to have to do MSHA
24 approved HazCom training. That means his MSDSs that he

1 brings onsite have to bear the legend of what the MSHA TLVs
2 are for the various substances or chemicals that are emitted
3 by the super strength Drano.

4 MR. FEEHAN: Let me correct something, Adele. The
5 only time that they are required to put the MSHA PEL, or the
6 MSHA permissible exposure limit, on an MSDS is when they are
7 producing a chemical. That is what the requirement is. Any
8 chemicals that are brought onto the property, however that
9 MSDS comes, that is what it is. It doesn't have to be
10 corrected.

11 MS. ABRAMS: Well, that needs to be clarified in
12 the final rule because I know there seems to be a lot of
13 confusion in the mining industry. And I might add, you are
14 then creating another issue, which is you are supposed to
15 make your miners aware of the air contaminant requirements
16 that are in the 1973 PELs under 5001, 56-5001, and the
17 analogous coal standard. And yet you are also supposed to
18 train them on the information contained on the MSDS,
19 correct? Which means that you are going to be training your
20 workers on two conflicting sets of PELs because, as you
21 know, current PELs for most substances differ significantly
22 from those that are currently codified in 30 CFR by the
23 incorporation of the 1973 ACGIH TLVs.

24 MR. FEEHAN: Well, but again --

1 MS. ABRAMS: These are just some of the issues.
2 And I can't sit here and resolve them for you today. But
3 what I am trying to do is point out some of the inherent
4 problems in this rule and where clarification is necessary,
5 and why additional reopening for comment is probably
6 warranted. If there is confusion among the lawyers as to
7 what is required on these MSDSs, I can guarantee you that
8 some small mine operator, you know, in Nebraska or Wyoming
9 is going to have a lot of trouble figuring out what they
10 need to do under the standard.

11 MR. NICHOLS: Well, I think we got it here. And
12 the panel can correct me if I'm wrong. But anything that is
13 brought on is going to have an MSDS sheet.

14 MS. ABRAMS: Yes.

15 MR. NICHOLS: The only thing that people are going
16 to have to go to the incorporations you are talking about,
17 the ACGIH and the other document, is if they produce a new
18 chemical at the mine site. Now I have tried to think of how
19 the majority of our operators would produce a new chemical,
20 and I can't come up with much. I can't come up with much
21 for a stone operator or a sand and gravel operator, large
22 and small service and underground coal operators. There may
23 be some really sophisticated mining operation out there
24 somewhere that they do produce new chemicals. But I just

1 can't bring it up in my memory.

2 So I would say it is almost nonexistent, that they
3 are going to have to go to these new documents to determine
4 an MSDS sheet for this new chemical that is being produced
5 because 99.99 percent of the time, the product being brought
6 on is going to be accompanied with an MSDS sheet.

7 MS. ABRAMS: Well, I think your assumption is
8 incorrect, that 99.9 percent of the time the products will
9 have those. At mines many times, at least in my experience,
10 people are running down to the Kmart to buy primer or, you
11 know, they are going to some auto repair shop or, you know,
12 auto parts, Trak Auto type of place, buying the solvents,
13 and the various lubricants that are used on the equipment.
14 But these are not being used in the same manner again as
15 Harry Homeowner would, so they would fall within the HazCom
16 requirements. And most of those stores -- I have never been
17 given an MSDS at Kmart when I have been buying paint for my
18 house. And I suspect that most of the guys who are sent at
19 the mines down to pick up something because they have run
20 out are not going to be given an MSDS either.

21 This is how a lot of the OSHA HazCom citations end
22 up being written, are products being brought in piecemeal to
23 the property and not the stuff that is ordered through some
24 kind of purchasing office. That's where you end up losing

1 some of the controls, and that's where you end up with the
2 paperwork deficiencies.

3 MR. FEEHAN: Let me ask a question about consumer
4 products, Adele. Don't the labels that come on even the
5 paint cans at Kmart -- don't those labels come with a
6 telephone number that you can call to get an MSDS, an 800
7 number typically?

8 MS. ABRAMS: Some do, some don't. I have done a
9 little bit of work on product labeling, but not that much.
10 But I can tell you the standard would prohibit you from
11 using that product until you obtain the MSDS. And, you
12 know, where the rubber meets the road, if you have gone down
13 to get an extra can of primer because you have run out, it
14 is because you need to finish the paint job, and you can't
15 necessarily stop everything and wait for three days to
16 obtain that.

17 MS. HUTCHISON: So what you are saying is they
18 already have some cans there, and they are going to get
19 another one.

20 MS. ABRAMS: And maybe a different brand, you
21 know. And that's where you run into the problems.
22 Obviously, if you have got an MSDS already, you don't need
23 to have one every time your purchase the product. But there
24 are, just because of the chemical makeup of substances,

1 differences -- I mean, to use something I'm more familiar
2 with, even between different brands of shampoo you can't
3 compare the labels and say that they have the same hazards.
4 They don't have the same chemicals. I might be sensitive to
5 a substance that is one but not in another. And this is the
6 level of scrutiny that I think you are going to be requiring
7 of mine operators that is going to impose a great burden.
8 And if it is going to impose a burden and it is necessary,
9 fine, but at least be upfront about what the burden is in
10 terms of the economic impact.

11 MR. NICHOLS: Okay, Adele. Thanks.

12 The next presenter will be Michael Sprinker, ICWUC
13 Health and Safety Department. Is Sprinker here?

14 (No audible response)

15 MR. NICHOLS: Okay. Joe Main is next on the list,
16 but I would imagine Jim Weeks (phonetic) is going to fill in
17 for Joe.

18 MR. WEEKS: Good morning. My name is Jim Weeks.
19 I'm an industrial hygienist consultant to the United
20 Mineworkers and I'm speaking on the mineworkers' behalf this
21 morning.

22 It was October 20, 1987, that the mineworkers sent
23 a letter to -- along with the steelworkers -- a letter
24 signed by Rich Trunka (phonetic), the president of the

1 mineworkers, and Lynn Williams (phonetic), the president of
2 the steelworkers, that wrote a letter to Bill Brockton
3 (phonetic), the secretary of Labor, and asked for this
4 standard to -- asked to write this standard. That was some
5 13 years ago.

6 Ms. Abrams raised the question, given the past ten
7 years, why the rush? The question I raise, why the ten
8 years? At the time, it seemed to us a very straightforward
9 problem. OSHA had adopted a rule. It had gone through a
10 lengthy rulemaking process. People had had experience with
11 it at that time. Employers were familiar with the rule.
12 People were getting familiar with the material safety data
13 sheets. Many of those employers also had mine operations.
14 And to us, it seemed very straightforward to just take that
15 rule and put it in MSHA, make a few adjustments here and
16 there that would be appropriate. And so it is a mystery why
17 it is has taken 13 years to get here.

18 We're not so concerned with the rush. We would
19 like you to get on with it. We think this is a very
20 important rule. In many respects -- I mean, there an
21 extraordinary number of details involving this rule that are
22 important and which we respect, but they should not be used
23 to obscure some very basic fundamental rights, human rights,
24 in a way, common sense rites. And that is that workers need

1 to know what it is that they work with. If they are going
2 to work in a safe and responsible manner, they need to know
3 what those materials are, what their hazards are, what
4 appropriate controls to put into place. They need to know
5 what operators are doing to control exposure to those
6 chemicals. And if workers are going to be partners in
7 making mines safe, they need to have this information.

8 It is a very fundamental issue. And as we looked
9 at the OSHA rule, we thought here is the rule. There are
10 many aspects of that, the OSHA rule, that we didn't
11 particularly like. But we felt that it had gone through all
12 of that debate. We could live with it. Let's do it.

13 So one comment that I want to make clear about it
14 is that we want you to get on with this rule. We support
15 the basic concept of this rule, the need for education for
16 material safety data sheets, and so on. I think that there
17 are things that can be done to streamline it to make it less
18 burdensome on everyone involved. But we support the basic
19 concept.

20 I particularly the idea that contractors are also
21 covered by this rule because a lot of the problems that
22 occur with handling chemicals come on miscommunication
23 between different employers and different workers with
24 different expectations and orientations. So I think it is

1 important that contractors be covered.

2 Now having said that, there are a number of our
3 comments that I would like to highlight here. First of all,
4 the threshold issue is what is a hazardous chemical. The
5 way the rule is written, it is frankly not clear. At one
6 point, it seems to put this responsibility on the mine
7 operator to identify what a hazardous chemical is. I think
8 this is unsatisfactory. I don't think mine operators are
9 appropriately trained. I think if I were an operator, I
10 would experience this as a burden for them to make that
11 particular determination.

12 What we would suggest is something along the lines
13 of what you put in there, a very simple and unambiguous
14 rule. If this is a chemical that is regulated by MSHA, it
15 is on the list, it is a hazardous chemical, it counts. I
16 would go a little bit beyond that. I think the reference to
17 the ACGIH TLV list is appropriate because those TLVs were
18 incorporated by reference in 1970 -- whenever it was, three
19 or two. I think they are obsolete in many respects. And
20 they were adopted as interim exposure limits so that they
21 fall within the realm of MSHA regulated substances.

22 I think the inclusion of IARC and the National
23 Toxicology Program list is also appropriate. What I would
24 add, however, is NIOSH. NIOSH puts out a rather odd book.

1 It is called a pocketbook. I have never seen anyone carry
2 it in their pocket. It is much too big. But it lists all
3 chemicals for which NIOSH has proposed or recommended
4 exposure limit. And the RELs come from a governmental body.
5 They have gone through review and rulemaking, more so than
6 the TLVs.

7 Again, if you look throughout the Mine Act,
8 everywhere where there is a recommendation that MSHA should
9 turn for advice on toxic chemicals, it names NIOSH. And so
10 I think that the NIOSH RELs and that pocketbook should be
11 included. If it is on that list, it should be covered under
12 this rule.

13 Now ignoring the REL list is such a consistent
14 MSHA policy, it does not appear in MSHA databases. It does
15 if you dig, but you have to dig. It does not appear in
16 other MSHA rules. I think it is no accident that it is not
17 on this list. I think that is mistake. I think that the
18 RELs should be included, and the REL list should be
19 included.

20 I'm not necessarily endorsing the RELs. I am
21 simply saying that if it is on that list, it should be
22 covered. And that, I think, is a fairly simple and
23 straightforward way of saying what are the chemicals that
24 are subject to this rule.

1 The second issue is that there are several places
2 in the rule where operator responsibility appears to be
3 contingent upon operator knowledge of what is going on. If
4 a chemical is not known to be in the mine, he is not allowed
5 to have -- then he is not responsible for material safety
6 data sheets. There are several places in the rule where
7 this is the case, where operator responsibility is
8 contingent on operator knowledge.

9 This is a problem in several respects. First of
10 all, it is a loophole that a less than responsible operator
11 could exploit and say, well, I simply didn't know that that
12 was there. I'm not responsible for it. And it is a
13 loophole that is created.

14 Now there are circumstances where it is reasonable
15 where operators in good faith saying I don't know, I didn't
16 know that that was there, et cetera. And if that is the
17 case, then the operators should be expected to raise that
18 issue. It shouldn't be handed to them in this rule, saying
19 that whether you know about it or not determines what you
20 do.

21 The second problem with this condition is that it
22 sends a message to mine operators, and in fact to miners as
23 well, that ignorance is an acceptable mining practice.
24 Ignorance of the chemicals that are in your mine is an

1 acceptable mining practice. It is not. In fact, this rule
2 is -- the purpose of this rule is to counteract that
3 ignorance. And so to put it in the rule in the way in which
4 it is put in -- it is in our comments -- I think is a bad
5 idea, and it would be fairly simple to take it out. And the
6 issues could be handled -- issues of people in good faith
7 not knowing -- and it could be handled later on a case by
8 case basis on their merits.

9 Another comment. And this pervades the whole
10 hazardous communication problem for OSHA and for MSHA, and
11 it comes up with MSHA. The assumption is that miners have a
12 right to know and need to know information about hazardous
13 chemicals. To go -- the next step is that the assumption is
14 that the people that are going to provide that information
15 are the mine operators. This assumption -- and then behind
16 that is the assumption that mine operators in fact know what
17 chemicals are in their mines, that they know what the
18 hazards are of those chemicals, and they know what to do
19 about them.

20 I think this is a false assumption. The question
21 that we raise is, who is going to train the trainers? I
22 think mine operators need to have some training program as
23 well because, I mean, miners have no corner on lack of
24 knowledge or of ignorance. I think there is plenty of it to

1 go around. And I think that there needs to be some explicit
2 attempt or effort in this rule so that mine operators can
3 get the training and the information that is appropriate to
4 manage chemicals in their mines in a responsible manner.

5 Now there are certain imbalances in this rule that
6 go to the issue of trade secrets. One of them is that there
7 are no criteria for identifying what in fact is a trade
8 secret. There is no, in fact, any test or determination or
9 evaluation of a claim of trade secrecy. I'm not saying a
10 test would be easy. But there is no attempt to acknowledge
11 that problem. In fact, a mine operator could say it is a
12 trade secret; I'm not going to tell you, and that's that. I
13 mean, who is going to question that?

14 So I think there should be some attempt made to
15 identify and evaluate claims of trade secrecy, more than
16 what is in the rule already. There are provisions in the
17 rule for operators and recipients of trade secret
18 information to reach some sort of an agreement over how to
19 handle that information. I think that is appropriate. I
20 don't think there is any real problem with that.

21 But then there is a portion of the rule that I
22 find very curious. And it is 47-77, paragraph C. And I'll
23 just read it to you. "If MSHA determines that the
24 confidentiality agreement would not sufficiently protect

1 against unauthorized disclosure of the trade secret, MSHA
2 may impose additional conditions to ensure that he
3 Occupational health services are provided without undue risk
4 of harm to the operator."

5 This is a very curious paragraph in a couple of
6 respects. First of all, a confidentiality agreement, even
7 though it is overseen by this rule, and this rule provides
8 for that sort of agreement, that is an agreement reached by
9 the recipient of the information and the mine operator. In
10 many respects, this is a private agreement. And one would
11 think that in order to reach agreement, the parties would
12 adequately protect their own interests so that they are
13 capable of reaching an agreement that would be satisfactory
14 to them.

15 So I don't see why the government should intervene
16 at all in that. I think you can oversee it. You can
17 provide for it and so on. But I think to intervene, if you
18 think it is inadequate, it seems curious.

19 Even more curious, however, is that you intervene
20 on behalf of the operator. As it says, "MSHA may impose
21 additional conditions to ensure that occupational health
22 services are provided without an undue risk of harm to the
23 operator." The purpose of this rule, indeed the purpose of
24 the agency, is to protect miners, not to -- you know, you

1 shouldn't run roughshod over operators. But the purpose of
2 the rule and the agency is to protect miners so that I don't
3 see why this particular provision is in there, why you would
4 intervene in the first place, and why you would intervene on
5 behalf of mine operators.

6 Okay. Let me go on. Another -- one of the
7 problems in the OSHA HazCom rule, and it is a persistent
8 problem, is that there is very little quality control over
9 information that is on material safety data sheets. I have
10 seen valid material safety data sheets that would say what
11 are the ingredients, and they all say petroleum distillates.
12 Well, that narrows it down to only a couple thousand
13 compounds. You know, it is better than saying it was water.
14 But, you know, I have seen data sheets like that. I have
15 seen data sheets that say there is a halogenated organic
16 compound, period. There are a couple thousand of those as
17 well.

18 Now those data sheets are not inaccurate, but they
19 are simply lacking in fundamental specificity. And there
20 needs to be some way of ensuring that the information on a
21 material safety data sheet is accurate and that it is
22 genuinely informative and not simply this kind of a cynical
23 display of whatever, or display of cynicism, I guess, is
24 what it is. And it is a little tedious, but there are

1 sections within the rule, and they are in our written
2 comments, in which it ends up that nobody ends up being
3 responsible for the quality of information on material
4 safety data sheets.

5 I think as a practical matter, the people that
6 ought to be held responsible are the people that produce
7 them, obviously, the suppliers that supply the solvents, the
8 paint, the whatever. Those are the ones that write the
9 sheets data, the ones that ought to be responsible for them.
10 And I don't know whether MSHA or MSHA and OSHA or some -- I
11 don't know whether your regulatory reach could extend to
12 suppliers, whether you could do that.

13 But what you could do is put some sort of
14 responsibility on mine operators to ensure that they get
15 accurate data sheets. And then if the mine operator -- the
16 mine operator could reach to their suppliers and say as part
17 of our condition of purchasing this stuff, we want accurate
18 data sheets. I think that would be a reasonable thing to
19 expect mine operators to do to get that.

20 Now while we are on data sheets, the provision in
21 the rule -- and I may not understand it accurately -- that
22 relieves operators of producing material safety data sheets
23 for their products I think is a problem in certain respects.
24 For example, lead is a toxic substance. Nickel is a toxic

1 substance. Chromium is a toxic substance. Those are all
2 products of the mining industry. And --

3 MS. HUTCHISON: The mining industry under the
4 interim final rule is not exempt from producing MSDSs for
5 their products.

6 MR. WEEKS: I thought I misunderstood it. I guess
7 I did. Okay. I'll forget that. Well, I think it is
8 appropriate because, you know, there are toxic materials
9 that are produced by the mining industry.

10 Okay. One final comment, and that is that there
11 has been -- there are many comments on the burden on small
12 mine operators. I think these are realistic problems. But
13 I think the way that they are talked about is incomplete.
14 They are realistic in the sense that you have got probably
15 one guy who runs the mine. He is the owner, he is the
16 foreman, he is the accountant, he is the payroll chief, he
17 is the safety officer, he is the purchasing agent, he is the
18 salesman. He is all of that. And to put on top of him --
19 maybe her in some cases -- to make that person a
20 toxicologist is just -- you know, it is another burden.

21 Nevertheless, all of those are important tasks.
22 If one is going to operate a mine in this country,
23 especially a small mine, I think that mine has to be
24 operated in a safe manner. And when we look at small mines,

1 we look at small mines in the coal industry, they continue
2 to have the highest fatality rate of any other mines. They
3 have a poor record when it comes to monitoring exposure to
4 dust, so that there is a burden here. And I think there is
5 a burden on miners who work in small mines. And I think one
6 needs to look at lessening the burden on miners who work in
7 small mines, at the same time that one could -- that you
8 could provide some more technical assistance to small mine
9 operators.

10 You know, I'm just looking for some balance here.
11 I'm trying to remind you what -- and to emphasize that the
12 mission of the agency is to protect miners. And to do that,
13 I think one needs to do that in a way that doesn't impose
14 undue burdens. But one needs to look at protecting the
15 miner. That is the mission, and that is what I think this
16 rule is about, and I think that is what the agency is about.

17 So that concludes my comments.

18 MR. NICHOLS: Okay. Thanks, Jim. I don't think
19 you can make the case that this rule is an undue burden on
20 small operators, given the fact that, as we said before, you
21 pull information together that is readily available. And
22 the fact that MSHA is to do outreach with developing generic
23 HazCom programs -- we'll even help write MSDS sheets -- and
24 try to incorporate that into training that is already

1 required by the small operators.

2 In fact, metal and nonmetal, with the new Part 48
3 regs, are right now in the process of doing compliance
4 assistance visits for the first inspection under Part 46.
5 Now MSHA has got a history of doing a lot of outreach with
6 regulations like from diesel to noise to training, and we're
7 going to do the same thing with the final HazCom rules.

8 So it is really hard to make that case that it is
9 a burden for small operators.

10 MR. WEEKS: Believe me, I'm not trying to make
11 that case. I'm trying to --

12 MR. NICHOLS: I'm speaking more to Jim Sharp and
13 Adele Abrams.

14 (Laughter)

15 MR. NICHOLS: As I look past you.

16 MR. WEEKS: No. I'm not trying -- I mean, I think
17 people make -- you know, I mean, I know some small mine
18 operators and so on. They have complained to me about these
19 things. I simply want to focus -- when we talk about
20 burden, let's talk about the burden on the miner. Those are
21 the people we need to pay attention to. I want to
22 acknowledge the small mine operators have a challenge that
23 they have to deal with, and I think a lot can be done to
24 help them out, but I don't want to let them off the hook.

1 MR. NICHOLS: Okay. I wouldn't disagree that it's
2 probably not a burden to operate a mine, but this one other
3 piece is not going to add to that burden.

4 MR. MAIN: I'm going to object to that.

5 MR. NICHOLS: Anybody got any comments or
6 questions for Jim?

7 MR. TEASTER: I just wanted to just reinforce some
8 of the things you just said in regard to that. The agency
9 recently has gone to great lengths in outreach with
10 seminars, with going to the mines to try to make this as
11 least burdensome as we possibly can and still obtain the
12 objective, which is to provide the health and safety that we
13 need for our miners, and we'll continue to do that with this
14 rule. I see no difference.

15 MR. NICHOLS: Why don't we take a ten minute break
16 and be back -- oh, let's be back at 20 until 11:00.

17 (Whereupon, a short recess was taken.)

18 MR. NICHOLS: Okay. Why don't we get started
19 back.

20 Is Michael Sprinker here?

21 Okay. Jim, are you ready to come up? Jim Sharp?

22 MR. SHARP: The paperwork burden of this rule is
23 beginning to mount.

24 MR. NICHOLS: Don't start that stuff.

1 MR. SHARP: Good morning, ladies and gentlemen.
2 My name is Jim Sharp with the National Aggregates
3 Association - National Stone Association. I am director of
4 health and safety services for that organization, and with
5 me today is Steve Sandbrook, a safety and health
6 professional with Eastern Industries in --

7 MR. SANDBROOK: Center Valley, Pennsylvania.

8 MR. SHARP: -- Center Valley, Pennsylvania. I
9 would like to make a short opening statement and then turn
10 over the podium to Steve for his remarks.

11 I'd like to read to the panel a letter written by
12 Joy Wilson, who is president and chief executive officer of
13 the National Aggregates Association - National Stone
14 Association dated December 13 written to Assistant Secretary
15 Davitt McAteer. We'll put this in. I'll give it to the
16 stenographer in a moment.

17 "Dear Davitt: NAA-NSA is disappointed that MSHA
18 has allowed so little time for interested persons to prepare
19 remarks for the public hearing on the HazCom rule, which is
20 set for tomorrow." Again, this is dated December 13.

21 "This regulation deserves the most serious
22 deliberations since it will have a significant impact on our
23 industry, particularly the small business sector. Since the
24 notice was officially announced December 11, interested

1 parties have just three days to prepare. This limited time
2 period will prevent many commenters from participating at
3 all, and for those who do it minimizes the possibility the
4 agency will receive the benefit of the well prepared views
5 of affected parties that will assist the agency in crafting
6 an effective final rule responsive to stakeholder concerns.

7 "We have previously expressed concern that MSHA
8 has not repropoed the rule after a ten year hiatus. MSHA's
9 decision to call HazCom an "interim final" rule was
10 unfortunate because it discouraged any comment at all from
11 some operators who took the designation to mean MSHA had
12 made up its mind on the regulations.

13 "In addition, two NAA-NSA requests to extend the
14 45 day period for comments on the interim final rule were
15 denied by the agency. The result was a rush to meet your
16 November 17 comment deadline, followed by yet another dash
17 to respond to a December 4 deadline for comment to the
18 Office of Management and Budget on the paperwork burden of
19 HazCom, which, as you know, is substantial. These requests
20 were made in part because we have still not received
21 important information from MSHA that we need in order to
22 make fully informed comments.

23 "Other affected parties share our view that the
24 agency has failed to provide adequate notice of and an

1 opportunity for comment on this rule making, as evidenced by
2 the numerous protests from others on the fast track HazCom
3 rule process. This situation is as regrettable as it is
4 unnecessary. We hope that MSHA will reconsider. Sincerely,
5 Jennifer Joy Wilson."

6 MR. SANDBROOK: Good morning, ladies and
7 gentlemen. My name is Steve Sandbrook. I'm a certified
8 mine safety professional and the safety manager for Eastern
9 Industries, Inc., located in Center Valley. That's just
10 about an hour north of Philadelphia in Pennsylvania.

11 I'm here today representing NAA and NSA. I'm not
12 a lawyer. I'm not an owner or an operator. I'm not a union
13 leader. I am just but one of hundreds of mine safety and
14 health professionals that will be adversely impacted by the
15 current pace and nature of the interim HazCom rule put forth
16 by your agency. Please understand my commitment and the
17 commitment of my fellow safety professionals in providing a
18 safe and healthful work environment for the employees of our
19 respective companies is paramount.

20 Compliance of the law is not a casual convenience.
21 It is our guide from which we must analyze, create, train,
22 implement, monitor, measure and adjust as needed not on a
23 one time basis, but rather daily, to assure successes in our
24 efforts. To this end, please listen and understand what I

1 have to say.

2 The fundamental problems as I see it are as
3 follows. First, this aggressive rule making procedure has
4 cast a shadow over MSHA's intent on why the rule must be
5 enacted so rapidly. The past history of this rule goes back
6 to April 7, 1986, when MSHA itself opposed promulgating a
7 standard of this nature, and I quote from the program
8 information bulletin 86-2M:

9 "...MSHA has promulgated standards requiring
10 miners to be trained in hazard recognition and avoidance,
11 including the hazards of handling chemical products.
12 Moreover, warning and labeling requirements for metal and
13 non-metal mines specifically require that hazardous areas be
14 posted in order to warn miners that toxic substances be
15 labeled both in a manner which identifies the hazards
16 involved."

17 Additionally, an attachment to the PIB cited
18 several MSHA regulations which would cover the intent of
19 HazCom that would eliminate the need for additional
20 regulation that is duplicative by nature as follows:

21 30 CFR 56 and 57.16004, Containers for Hazardous
22 Materials. "Hazardous materials shall be stored in
23 containers of a type approved for such use by recognized
24 agencies. Such containers shall be labeled appropriately."

1 30 CFR 56/57.20011, Barricades and Warning Signs.
2 "Areas where health and safety hazards exist that are not
3 immediately obviously to employees shall be barricaded, or
4 warning signs shall be posted at all approaches. Warning
5 signs shall be readily visible, legible and display the
6 nature of the hazard and any protective action that is
7 required."

8 The third is 30 CFR 56 and 57.20012, Labeling of
9 Toxic Materials. "Toxic materials used in conjunction with
10 or discarded from mining or milling of a product shall be
11 clearly marked or labeled so as to positively identify the
12 nature of the hazard and the protective action required."

13 I understand that times change, along with people.
14 However, change of this magnitude that affects my or our
15 ability to effectively manage safety programs will hinder
16 and seriously compromise my effectiveness for real time
17 safety. Currently I use an 80/10/10 split for my efforts.
18 That's 80 percent of my time is doing the walk and talk.
19 I'm out there walking. I'm out there talking to my people.
20 I'm listening to what they have to say. Ten percent of my
21 time is spent pushing paper. The remaining ten percent of
22 the time is spent on training.

23 If this HazCom rule goes into effect, I'm afraid
24 not only for myself, but for my fellow mine safety

1 professionals, that split will now turn into a 10/80/10 with
2 ten percent walk and talk, 80 percent pushing paper and ten
3 percent training.

4 While MSHA molded their program after OSHA's, the
5 image I see in the mirror in one of enforcement. I have no
6 doubt that this rule will be the number one cited violation
7 and continue to be, as OSHA has proven since their rule was
8 enacted. I believe there's a lesson here that we should
9 investigate together. Together.

10 Together we, MSHA and industry, worked towards a
11 common goal in creating Part 46. Congress praised us. The
12 non-mining sector envied us. Mr. McAteer shared in the
13 accolades and vowed to continue to work with the industry in
14 the future in creating a safer work atmosphere. We are
15 doing this currently with programs with the high wall safety
16 program, with surface haulage, with the noise and dust
17 workshop, and that's all great. That's where the rubber
18 meets the road when we're out there creating these programs.

19 What happened? This was a perfect opportunity to
20 once again join together in the spirit of not only the Act,
21 but also in the spirit of common sense. Where else can you
22 get better input from those than who are to be regulated
23 when in the end we can all agree on sound safety management
24 practices for the good of the industry and the thousands of

1 men and women who are its foundation?

2 Yes, we have this period to comment and become
3 part of the record. However, I again must question MSHA's
4 motive. I believe any comments at this time are moot and
5 that MSHA has already made up their mind and that this is a
6 shame.

7 The integrity of the agency, which was on the
8 upswing after Part 46, I feel will all be but eliminated.
9 Micromanagement breeds contempt. Contempt breeds poor
10 attitudes. Poor attitudes breeds unsafe behaviors, and
11 unsafe behaviors get people hurt. We need to work together
12 for a safer future, and that includes developing the
13 regulation.

14 I'm not an accountant. I'm definitely not an
15 accountant. However, in reviewing the cost analysis for the
16 metal and non-metal annual compliance costs, I believe the
17 figures presented are grossly inaccurate. \$230 to \$270
18 estimated annual cost for compliance. This equates into
19 approximately eight to ten hours of a safety professional's
20 salary if they make \$60,000 per year.

21 Now, what about the other costs, such as labeling
22 of material, administrative costs to manage the MSDSs,
23 training, internal enforcement, inventory control, research?
24 I know my costs are a couple of thousand dollars annually

1 currently to comply with my state right to know laws. I
2 have little confidence in the figures, and I believe they
3 need further review and cross check back to real life
4 applications.

5 Finally, the aggressive nature of the rule making
6 that has occurred in the agency is puzzling. I understand
7 that I can expect five proposed new regulations within the
8 first six months of 2001. I cannot for the life of me
9 figure out why such a comprehensive agenda that will reduce
10 the effectiveness of the safety and health professionals in
11 their industry is going at supersonic speed.

12 I'm not a cynical person. However, this action is
13 viewed as political in nature due to potential changes
14 within the Department of Labor. I hope I'm wrong, but that
15 is the prevailing word in the pits.

16 I hope you didn't just hear me today. I hope you
17 were listening. Thank you very much.

18 MR. NICHOLS: I don't think you would agree,
19 Steve, that working on a rule for 12 years is going at
20 exactly the speed of light. I think this addresses the rule
21 making procedure you laid out here.

22 MR. SHARP: If I could interject there?

23 MR. NICHOLS: Go ahead, Jim.

24 MR. SHARP: We actually think you were considering

1 a rule for 14 years. Otherwise -- because the PIB was dated
2 in 1986, which, incidentally, is not mentioned at all
3 anywhere in your preamble as part of the history of this
4 rule making, which we consider to be a very real part of the
5 history of the rule making.

6 We also wonder why it took you ten years.
7 Obviously when you write rules it's a matter of resource
8 application. Somebody in the agency decided that there
9 wasn't obviously enough interest in this rule to push it
10 through in the early 1990s or it would have been pushed
11 through in the early 1990s. I mean, obviously there was not
12 an emphasis on this from top management. I mean, it's
13 evident.

14 Now, is that because of the indifference? Was
15 that because of a difference of opinion within the agency?
16 I'm asking you that question. I'd like to have an answer to
17 it.

18 MR. NICHOLS: Well, let me answer that.

19 MR. SHARP: Then I want to finish with my
20 statement.

21 MR. NICHOLS: Okay. The Assistant Secretary had
22 at least a half a dozen priority issues he wanted to deal
23 with. Part 46 was one. Diesel safety rules was another.
24 Noise was another. Coal mine respirable deaths was another,

1 and HazCom was included in that list of priorities. Okay.
2 And diesel particulates.

3 You can see we've had an aggressive agenda, and
4 some of these rule makings have come to completion, and so
5 this is one that's coming to completion out of his mix of a
6 half a dozen priorities.

7 MR. SHARP: You're talking about Mr. McAteer?

8 MR. NICHOLS: Yes.

9 MR. SHARP: Well, Mr. McAteer took office in 1994.
10 This rule was proposed in 1990. What happened before 1990
11 and 1994.

12 MS. HUTCHISON: 1992.

13 MR. SHARP: What Cherie?

14 MS. HUTCHISON: 1992.

15 MR. SHARP: No, ma'am. I don't think so. The
16 rule was proposed in 1990.

17 MS. HUTCHISON: Yes, but Davitt came in 1992?

18 MR. SHARP: 1992? I don't think so.

19 MR. NICHOLS: 1993.

20 MR. SHARP: 1994.

21 MR. NICHOLS: I guess it really doesn't matter. I
22 mean, did you ever change bosses and get different
23 priorities, Jim?

24 MR. SHARP: Do you not agree that ten years is a

1 long time for a rule making?

2 MR. NICHOLS: Not by MSHA standards, I mean.

3 MR. SHARP: If you think ten years is a long time,
4 how do you assess the rule making speed with regard to Part
5 46 then?

6 MR. NICHOLS: Well, you're looking at a one year
7 snapshot. We worked on the idea of promulgating Part 46
8 from the day the training rider went on, so that discussion
9 was in process for 20 years before that rule was ever
10 completed.

11 MR. SHARP: Okay.

12 MR. NICHOLS: We were petitioned in the mid 1980s
13 to revise the noise regs, and here it is -- you know, we got
14 it out last year, 1999.

15 We had a Secretary's Advisory Committee on diesels
16 sometime in the 1980s. Finally, you know, we got the diesel
17 safety rule out. We have done a lot of work on the diesel
18 particulate rule.

19 But for the reasons, you know, that we're here
20 today, you know, you have strong opinions on all sides of
21 it. It takes some number of years to produce a rule.

22 MR. SHARP: All right. Well, I guess what I'm
23 talking about is let's talk about the different period of
24 time between the proposed rule --

1 MR. FEEHAN: I'd like to add --

2 MR. SHARP: The proposed rule and the final rule.
3 Ten years for HazCom. The proposed rule on 46 was 199, and
4 it was promulgated a year later. The proposed rule on noise
5 was 1996. It was promulgated in 1999.

6 You know, I kind of disagree with you a little bit
7 on the priorities here. I do think the agency put HazCom on
8 a back burner, and there was a reason for it. You've told
9 me what one reason is, but I'm saying I'm not sure that that
10 is the entire reason.

11 MR. FEEHAN: There is some more to the history of
12 this, Jim.

13 MR. SHARP: There's some what?

14 MR. FEEHAN: There is more to the history of this,
15 too. Some of the comments that we received to the 1990
16 proposal asked us to hold off and to use OSHA's experience
17 in our rule making.

18 Now, OSHA didn't promulgate -- you know, they were
19 going through a rule making process until what, 1995 when
20 they came out with their HazCom for general industry? 1994?

21 MR. SHARP: Well, they proposed HazCom in 1983 for
22 SIC codes 20 to 39.

23 MR. FEEHAN: Right.

24 MR. SHARP: That went into effect that year. Then

1 in 1987 there was a Court decision which reconciled a lot of
2 issues that were floating around, one of which was
3 discontinuity on labeling with regard to OSHA, states that
4 were not under the OSHA state plan. They needed to have
5 some sort of preemption, so there was a deal struck to make
6 sure that OSHA's rule would be predominant with regard to
7 labeling, and it would be extended to 3,500,000 employers
8 and 35,000,000 workers. That was in 1987, so that rule
9 really went into effect in 1987.

10 I can tell you for a fact that whenever I took my
11 job in an OSHA regulated industry in 1990, one of my first
12 undertakings was to get them to comply with the OSHA HazCom
13 rules.

14 MR. FEEHAN: Wasn't there a change in OSHA,
15 though? Didn't they promulgate for general industry in
16 1994?

17 MR. SHARP: They issued a rule in 1994, which I
18 happen to have here actually, that basically clarified some
19 minor issues that had arisen since the rule was promulgated,
20 but it was essentially the same rule, and employers -- all
21 of general industry had to be in compliance with that as of
22 1987.

23 MR. FEEHAN: Well, what I understand about the
24 history of the regulation is that we had comments that asked

1 us to take into consideration OSHA's experience with its
2 HCS. There was a change in the regulation for general
3 industry back, you know, three or four years after we did
4 our proposed rule. Then there was also at that time a
5 request of OSHA that they have their advisory committee on
6 occupational safety and health standards look into whether
7 the HCS was effective or not.

8 The measure of that effectiveness didn't become
9 known until I think it was 1996, so really I think, you
10 know, that was some part of the history of the regulation
11 and what was going on in extending it, extending the time
12 that it took.

13 MR. SHARP: All right. So you're really
14 acknowledging that there were developments between 1990 and
15 2000 that took place that really should have resulted in,
16 and this is industry's argument, a reproposal of this rule.
17 You've just stated some of them.

18 Adele mentioned the global harmonization
19 initiative. Let me ask you this question, and I have not
20 finished the statement I was going to make earlier, but I'll
21 get to that. Let me ask you this. Has any federal agency
22 officially or unofficially asked you to repropose this rule?

23 MR. FEEHAN: I don't know that. Does anybody know
24 that?

1 MR. NICHOLS: I'm not aware of any.

2 MR. FEEHAN: I don't think we --

3 MR. SHARP: You don't have that knowledge?

4 MR. FEEHAN: I don't.

5 MR. TEASTER: Do you remember his comment on the
6 earlier statement you said about Part 46? Part 46 was a
7 rule that there was a lot of work up front before the rule
8 making process officially began. There was a consensus by
9 most of the concerned parties that there was a need for this
10 rule.

11 The rule, when it went out, didn't have a lot of
12 opposition to it, plus through the negotiating process of
13 getting this rule making there was a deadline that was set
14 that we tried to meet, so I don't think when you're talking
15 about numbers just for a certain portion of the industry,
16 and most of the people in that industry recognized that
17 there was a strong need for training of the miners, so we
18 got that one through with very little opposition. Not that
19 we didn't have some differences, but for the most part.

20 I don't think that would necessarily be related to
21 this type of rule making where you have varying opinion of
22 what the rule should look like.

23 MR. SHARP: But you will not deny my timing, if
24 you look at opposed versus final, that HazCom took ten, Part

1 46 took one, the noise rule took three. You proposed the
2 diesel particulate rule in when, 1997-1998? It's about to
3 be finalized in 2000. That's three. If you look at it from
4 that perspective, we're talking about an extended period of
5 time.

6 You've also acknowledged from the panel here just
7 a few minutes ago that there have been changes that have
8 taken place in the last ten years that bear on this rule
9 making. Why then didn't you -- and you cannot answer the
10 question whether or not another federal agency has asked you
11 to repropose, yet you did not repropose the rule. With all
12 of this going on, you did not repropose the rule.

13 MR. NICHOLS: You know, we may have to agree to
14 disagree on the need to. I mean, it's our position that we
15 have had a long history of back and forth in public hearings
16 and proposals on this issue and that we have developed a
17 good, common sense, straightforward rule.

18 If you have additional comments, that's what this
19 hearing is for. I mean, you know, give them to us today.

20 MR. SHARP: Well, I'm commenting.

21 MR. NICHOLS: All right.

22 MR. SHARP: You're hearing it.

23 MR. NICHOLS: But to say this rule has not been --
24 you mentioned noise. I mean, we worked on that rule for 12

1 or 15 years. It probably tracks the same time frame as
2 HazCom does.

3 If my memory serves me, the diesel advisory
4 committee probably tracks the same time period. It was
5 during a previous -- I'm not sure if it was during the
6 previous Administration, but it's got some age on it. All
7 our stuff has got some age on it.

8 MR. SHARP: But this rule has some real age on it
9 when it comes to proposing it and finalizing it. That is
10 not the case with the other rules that I have cited. It's
11 just not.

12 Look at it from my perspective. That raises a
13 question. That raises a question of what the agency's real
14 intent was and were they unified on this and what was your
15 emphasis. If you had wanted that rule to come out in 1992,
16 it would have come out in 1992. If you had wanted that rule
17 to come out in 1994, it would have come out in 1994.

18 Now, let me just go on with the rest of my comment
19 about the timing of this. Now the rule is out. You issued
20 an interim final rule form, which is a strange duck in terms
21 of MSHA rule making. I mean, that's not a common practice
22 of the agency -- I think you'll agree with that -- to issue
23 it in the interim final as opposed to final.

24 Then you give us a mere 45 days to respond to a

1 rule, a month and a half to respond to a rule that took you
2 119 months to issue in final form. Do you really think that
3 we could in 45 days get all the information, for example,
4 that we needed on the economic analysis impact of this,
5 study what you have done, prepare our own analysis and then
6 distill that analysis in such a way as to put that into a
7 proper context for comment in 45 days? Do you think that we
8 could have done exactly the same thing with regard to
9 significant risk?

10 You yourself have admitted you've got a database
11 of 50,000 of which 410 are for poisonings. We asked under a
12 FOIA to get that database on September 29. We got an
13 impressive and fairly rapid response to it, but we still did
14 not have all the information that we needed even to analyze
15 that database by November 17. We did not have that. We
16 don't think we still have that.

17 You asked for comment from the industry. We can't
18 give you comment when you rush us, and we don't understand
19 why you rush us when it takes you 119 months and you only
20 want to give us 45 days. Now you keep this pace going with
21 this hearing.

22 If you really want to know the impact of this on
23 small businesses, if you really want to know that, you
24 should do what you did with Part 46. You should have

1 hearings all over the country, and you should allow enough
2 time for associations like NAA-NSA to explain the rule to
3 small business because I assure you the small business
4 operator is not going to get this thing and read through it.
5 He won't read through the whole thing, and he won't even
6 read through the last seven pages, which is the rule itself.
7 He won't do that. It has to be explained to him.

8 You did that with 46. You had outreach all over
9 the country. It has to be explained to him, and then he has
10 to see the impact of it on his business, and then he has to
11 put that in terms that can be presented to you. That takes
12 time. You can't do that in three days.

13 MR. NICHOLS: We're going to do that.

14 Now, what part of this rule is so complicated that
15 you don't understand?

16 MR. SHARP: Marvin, it's not that I don't
17 understand this rule. I'm not the one that has to implement
18 it. I work for a trade association that falls under OSHA.

19 MR. NICHOLS: Okay. Let's follow this line of
20 thinking.

21 We're going to eliminate the mystery of this rule.
22 First of all, the rule requires that you pull together
23 information you probably already have. If you don't have
24 it, you should have it. That's the MSDS sheet for chemicals

1 that are being brought on the mine property.

2 You're going to have to write up a HazCom program.
3 Now, if you can't do that, we're going to assist in doing
4 that. We're going to put together some generic ones, and
5 then we're going to have -- we'll have a tool box. We'll
6 have a compliance guide. Then, as with every other
7 regulation we promulgate, we'll have a series of seminars
8 out in the mining community.

9 You're already required to do the training for
10 Part 46. There's no reason why this can't be incorporated
11 right into Part 46. You talk about you're already doing
12 some things with right to know. That's got to include
13 having these MSDS sheets already, so I just don't see the
14 complication and the burden.

15 You may not agree with it. I don't see how you
16 can make a rule that this is a mystery and it's burdensome.

17 MR. SANDBROOK: That's under my OSHA HCS where I
18 have my hot mix asphalt plants and block plants and shops,
19 associated shops. Now I have to come up with another plan,
20 okay, to meet my mining facilities.

21 Some of those you are talking about, the small
22 facilities. I've got two facilities right now with no
23 running water.

24 MR. NICHOLS: All right. What kind of mining

1 operations are these?

2 MR. SANDBROOK: Sand and gravel those were.

3 MR. NICHOLS: Okay.

4 MR. SANDBROOK: They're the smaller ones I'm
5 talking about.

6 MR. NICHOLS: All right. Now, what kind of
7 chemicals are we likely to have on the property? We're
8 going to have probably some gasoline and diesel fuel and
9 motor oil. Tell me what else beyond that.

10 MR. SANDBROOK: To give you a comprehensive list
11 right now --

12 MR. SHARP: Solvents, battery acid, paints,
13 varnishes.

14 MR. NICHOLS: Okay. We're probably up to a dozen.

15 MR. STONE: Okay.

16 MR. SHARP: Marvin, let me ask you something.
17 When was the last time you did an inventory of the chemicals
18 in your home? I would urge you to do that. You're going to
19 get a rude awakening of just how much you have there.

20 MR. NICHOLS: For them that pose a hazard, I've
21 done all of them. You know, NIOSH done a survey back a long
22 time ago and identified many, many chemicals on my property.

23 That's not what this rule is dealing with. This
24 rule is dealing with those that may pose a problem to a

1 miner.

2 MR. SHARP: It's dealing with hazardous chemicals,
3 those that are a physical and a health hazard. Hazardous
4 chemicals. OSHA says there are oh, let's see, 650,000 of
5 those.

6 MR. NICHOLS: Okay.

7 MR. SHARP: Six hundred and fifty thousand
8 hazardous chemicals in the inventory that they know about.

9 MS. HUTCHISON: Not a small sand and gravel
10 operation.

11 MR. NICHOLS: Yes. Let's talk about --

12 MR. SHARP: No. In the universe, in this country,
13 there are 650,000 hazardous chemicals.

14 You're making a point, Marvin, that it's just
15 those chemicals that pose a risk. I'm saying no, it's not.
16 It's hazardous chemicals. What is that universe? Six
17 hundred and fifty-thousand potential chemicals we're talking
18 about.

19 MR. NICHOLS: Okay. How many of these 650,000 are
20 you going to have at this sand and gravel operation?

21 MR. SHARP: Marvin, that's what I'd like them to
22 come tell you if you'll just give them an opportunity
23 through public hearings to do that.

24 MR. NICHOLS: But common sense will tell us right

1 here at this table. We've mentioned a dozen.

2 MS. HUTCHISON: Our experience.

3 MR. SHARP: Now, wait a minute. Wait a minute.
4 We need to be talking to the people who are going to be
5 regulated. Let's hear what they think common sense is.

6 MR. NICHOLS: We've been --

7 MR. SHARP: Let me just say this, too. You have
8 said that this is not a burden to small operators, yet on
9 page 59052 of your preamble you admit under the Paperwork
10 Reduction Act that there are 24 provisions of this rule,
11 which there probably are only 30 to 35, that have paperwork
12 requirements and responsibilities. Twenty-four of them.
13 You've just heard Steve say he's 8/1/1. He's going to have
14 to reverse his ten percent on paperwork to make it 80
15 percent of paperwork.

16 If you looked at the NACOSH working group, if you
17 heard the American Dental Association, for example, begging
18 for an exemption to this rule because of the paperwork
19 burden, if you read books called common sense where this is
20 nothing but a paperwork blizzard where books of MSDSs are
21 out in the operators' areas and are gathering dust because
22 nobody looks at them.

23 The only time MSDSs are looked at, and this isn't
24 in our testimony, is when somebody has a beef against the

1 company and wants to raise holy heck or after there is an
2 incident, but they never ask for them or rarely ask for them
3 in advance.

4 Tell me this is not a -- I'm not a safety and
5 health person in the mining industry. I'm not at a mine.
6 I'm not Mr. Sandbrook. I want you to hear those people tell
7 you what this rule is going to do, and you cut off the
8 opportunity to have that occur.

9 MR. NICHOLS: I don't think we have.

10 MR. SHARP: That I think is shameful.

11 MR. NICHOLS: We haven't done that.

12 MR. SHARP: How can you say that, Marvin, when you
13 give 45 days for a rule that took you 119 months to
14 promulgate? You give three days for a public hearing.
15 Three days' notice for a public hearing. Three days.

16 MR. NICHOLS: I dare to say that in the ten year
17 history of public hearings and rule making proposals that
18 many of the comments you have made today have been in those
19 previous exercises.

20 MR. SHARP: Wait a minute. Wait a minute. This
21 rule is new. This is a brand new rule. Yes, there are
22 similarities to the proposed rule, but this is a rule that
23 requires careful deliberation because it has provisions and
24 changes in it that the proposed rule does not have.

1 MS. HUTCHISON: Like what?

2 MR. SHARP: And there is certainly a new
3 environment now than what there was ten years ago, and that
4 needs to be factored into it, the most obvious of which,
5 perhaps the most profound of which, is this paperwork
6 requirement --

7 MS. HUTCHISON: That --

8 MR. SHARP: -- and all the requirements that you
9 have here for that.

10 You've heard Adele talk about global
11 harmonization. You've heard Richard himself talking about
12 the NACOSH working group. You've heard him also talking
13 about OSHA wanting to take a look at this rule and having to
14 do something about it in 1994-1995 to clarify minor issues
15 that were a carry over from the 1980s. This is just some of
16 the issues, yet you turn around, and you don't repropose it.
17 You don't give us an opportunity for meaningful comment. It
18 just exasperates us.

19 We just came through a rule making on Part 46
20 where we all sat around the table with labor, and I would
21 strongly urge that we have the same kind of dialogue again
22 on HazCom. We sat around a table and crafted in 18 months a
23 final rule on Part 46 that you couldn't get done in 20
24 years.

1 Cherie, you laugh, but it's true. It's true.

2 MS. HUTCHISON: You father it for 20 years.

3 Have you sat down and done a comparison between
4 the proposal, OSHA and the interim final?

5 MR. SHARP: No, because I haven't had -- for the
6 OSHA rule and the interim final? The OSHA rule and the
7 interim final?

8 MS. HUTCHISON: Well, between the states.

9 MR. SHARP: Pardon?

10 MS. HUTCHISON: Between the states.

11 MR. SHARP: No, because I haven't had enough time
12 to do that. You haven't given me the opportunity.

13 MR. NICHOLS: He needs more time.

14 MS. HUTCHISON: What?

15 MR. NICHOLS: He needs more time.

16 MS. HUTCHISON: Exactly.

17 MR. SHARP: I haven't had enough time. I haven't
18 had enough time. No, I haven't, but I certainly know a lot
19 about the OSHA HazCom rule because that had to be
20 implemented in my previous job. I know a heck of a lot
21 about it.

22 MS. HUTCHISON: Well, what is new and different
23 about the interim final rule that you think is significant
24 in terms of the proposal and the OSHA rule?

1 MR. SHARP: Small mining business have not had to
2 comply with the OSHA HCS, so that part of your comment is
3 irrelevant.

4 My interest is in trying to determine how they're
5 going to be able to comply with this easily and not do so in
6 a manner that detracts from other vital health and safety
7 issues that they have to address that are more vital than
8 this.

9 I can tell you what my experience has been under
10 OSHA HCS as a health and safety professional in charge of a
11 company that had to put this into 135 sites. We developed a
12 program which we purloined, very frankly, from an existing
13 boilerplate, tailored it to our operations the best we
14 could, sent that to all 135 sites along with a sample
15 inventory form.

16 Told those sites they had to do the chemical
17 inventory. They had to keep that chemical inventory on
18 file. They had to keep it up to date. Told them that they
19 had to gather MSDSs. They did that. Told them that they
20 had to do training. They did that.

21 We had a policy statement written right from the
22 top of our organization which said this is important, and
23 you need to do it. I can tell you that I got nothing but
24 resentment out there from the get go, and the resentment was

1 you have imposed a massive paperwork burden on us, and we
2 simply cannot see the benefit of it. You are taking away
3 precious time and resources that we need to address other
4 safety and health issues.

5 The position of the National Aggregates
6 Association - National Stone Association on this rule is
7 that that is what this does; that you have in place
8 sufficient resources to account for most -- most -- of what
9 you're covering under this rule. Now, I will grant you
10 there are probably some things that we need to talk about,
11 but we do not need a rule of this extent in order to make
12 that happen. We simply do not.

13 We are asking you to please remand this rule,
14 convene a special group, if you will, a working group such
15 as OSHA, did that consists of labor, industry and you folks,
16 and let's sit down and work this thing through. I can
17 guarantee you you'll have it, what you want, probably not in
18 2001, but you'll probably have it in 2002, and everybody
19 will be happy, and you won't have this screaming that's
20 going on now.

21 MS. HUTCHISON: Jim?

22 MR. NICHOLS: Here's how we would plan to
23 implement the rule, and this would be totally for small
24 operators, intermediate operators, anybody that wants to

1 help.

2 The rule has a delayed implementation date of
3 October, 2001. That gives us a period to go in and work
4 with small operators to try to help them develop or help
5 them develop a HazCom program and incorporate that into the
6 training that you're going to be doing. Now, that doesn't
7 seem to me to need a lot of -- there's not a lot of mystery
8 there, I don't think.

9 MR. SHARP: Marvin, if the agency will please
10 allow the small operator to give you its opinion on that, we
11 can arrange for that to happen, but you have got to allow
12 the mechanism for that to happen, which you have not done
13 here.

14 I can tell you that it is not nearly as simple as
15 you think. Of course, the question that keeps popping up
16 into my mind is that there are so few chemicals out there at
17 these small businesses. Why don't you just exempt them? If
18 this is such a small deal for small businesses as you claim,
19 there are so few chemicals there, why are they not exempt?

20 Why does a small business, one operation, have to
21 have a written plan at all? They may not even have any
22 chemicals. They still have to have a written plan. What
23 sense does that make if I were a small operator and I had no
24 chemicals?

1 The other thing is you deincentivize them from
2 getting rid of their hazardous chemicals so they don't fall
3 under this rule. If you have an incentive there that says
4 well, I have to have this rule so I'll get rid of all my
5 hazardous chemicals and I'll be exempt. You don't have that
6 mechanism. You don't even have that there. There's no
7 incentive for anybody here. That's just one of the
8 problems.

9 I want the small business community to come and
10 talk to you. You allowed that to happen with Part 46. You
11 were very, very good about it. You had six hearings all
12 over the country two or three times removed, and they came,
13 and they talked to you. I read every one of those
14 transcripts. I know they talked to you, and you listened.
15 You put together a very good rule.

16 I'm here to tell you this is not a good rule for
17 the small business community. I just know it by instinct,
18 but I want them to come and tell you the horror stories that
19 are going to be created. I've already told you one of them,
20 MSDSs stacked up gathering dust. Nobody makes reference one
21 to an MSDS. They just won't even look at them.

22 MR. SANDBROOK: Personally, I have two three-ring
23 binders that are four and a half inches, and --

24 MS. HUTCHISON: You have that many chemicals at

1 your site?

2 MR. SANDBROOK: No. I have to do that. The way
3 our program is set up is through our entire corporation.
4 It's easier for me to go ahead and boilerplate all the
5 chemicals rather than customize for each location. I have
6 46 different operations, 17 quarries, I think it's 15 HMA
7 plants, block plants, trucking.

8 MS. HUTCHISON: Do you consider yourself a small
9 business?

10 MR. SANDBROOK: From the quarry aspect, I don't
11 know what the definition is honestly. Under 20?

12 MR. SHARP: Under 20 or under 500? Which
13 definition are we taking? The Small Business
14 Administration?

15 MR. NICHOLS: Historically we've said less than
16 20. The Small Business --

17 MR. SANDBROOK: Less than 20? That would be --

18 MR. SHARP: At a site or at a company?

19 MS. HUTCHISON: That's why we go with less than 20
20 because we --

21 MR. SHARP: Per site?

22 MR. SANDBROOK: Per site? Then I'd be a small
23 operator.

24 MR. SHARP: Is it a site or a company?

1 MR. NICHOLS: I mean, what difference does it
2 make? We're talking about --

3 MR. SHARP: We're trying to answer her question.
4 We're just trying to answer her question.

5 MR. STONE: We use the establishment, which would
6 be fewer than 500. We also use 20, under 20. We use both.
7 We evaluate both when we do our analysis

8 MR. SHARP: And that is at a site?

9 MR. STONE: At a site.

10 MR. SHARP: So, now what's your answer?

11 MR. SANDBROOK: My answer is at a site I have 75
12 percent of my operations, fewer than 20 people.

13 Overall in my entire corporation where I'm
14 regulated by OSHA, MSHA, DOT, okay, and creating -- and the
15 Pennsylvania right to know laws, putting all of that program
16 together, that's how many MSDSs I have because I don't have
17 the time to customize for each location.

18 That would be a waste of resources, so I make one
19 program that covers everything to the best of my ability
20 that's above and beyond. For example, you say a two year
21 retention on MSDSs, whereas you're looking at what, 30 years
22 for OSHA.

23 MR. FEEHAN: So you have to maintain MSDSs for the
24 longest group that you're --

1 MR. SANDBROOK: Absolutely.

2 MR. FEEHAN: So your asphalt operations --

3 MR. SANDBROOK: Right.

4 MR. FEEHAN: -- you're having to keep MSDSs for 30
5 years?

6 MR. SANDBROOK: Right. Right. The thing is, from
7 a management standpoint with my time and effectively using
8 my time, okay, I'm going to apply that same standard to my
9 mining facilities, so I'm not -- you know, I'd rather have
10 to just hold that paper rather than waste time, go over
11 there, cull this out after two years, you know, and do this
12 if we don't have it and do the notice, so I do it the
13 strictest possible, which is --

14 MR. NICHOLS: So you've already got a program? I
15 man, you've already got a HazCom program?

16 MR. SANDBROOK: I'm one person, one company, that
17 has a program.

18 Do you know how that program came into effect?
19 When I first started there five years ago, okay, our
20 incident rate was horrible. It was well above the national
21 average, and I mean well above the national average. Now we
22 are well below. Five years.

23 Because I came in there, and I'm going to say I
24 came in there, okay, and I opened the doors. I stopped the

1 micro management. I formed work teams. I don't make a
2 decision. That's not my job. My job is to bring people
3 together, because who better knows the materials out there
4 than the people who have to work with them and what they do
5 with them, so I bring them in together.

6 There are no bad ideas. Everybody has great
7 ideas. There are just some ideas that are better than
8 others, and by getting these people to buy into this, those
9 people and myself, we work together. We develop our policy
10 and procedure. I don't do that. We do that as a team.

11 MR. NICHOLS: Okay. You've already got a HazCom
12 program. Now, how is MSHA's HazCom rule going to add an
13 additional burden to you?

14 MR. SHARP: Well, I can answer that.

15 MR. SANDBROOK: I just had done that. I just said
16 that. I'm now going above and beyond. Do I really have to
17 do that?

18 What I'm saying is if in fact you are mirroring
19 the OSHA HazCom, I see the differences. With the global
20 harmonization system coming on, I'm going to have to change
21 again.

22 MR. NICHOLS: Wait a minute. I mean, if you have
23 an OSHA HazCom program, I mean, I can't imagine what small
24 tweaking you're going to have to do to make that fit MSHA.

1 You're already required to do Part 46 or Part 48 training.
2 I can't imagine what burden it's going to add to include
3 the --

4 MR. SHARP: Well, let's see.

5 MR. NICHOLS: Let me talk to him, Jim.

6 MR. SHARP: Okay, Marvin.

7 MR. NICHOLS: That you're going to add in the
8 training you already have to do. Now, tell me where this
9 additional burden is going to come.

10 MR. SANDBROOK: Because I now have a program
11 designed for MSHA, okay, I now have to stop and take a look.
12 Okay. Here's a regulation that has come down the pike.

13 MR. NICHOLS: Right.

14 MR. SANDBROOK: Now I've got to take a look at it.
15 I've got to pull out my OSHA, okay? I've got to pull it
16 over here to the side, and now I have to start comparing the
17 two, okay? I now have to reconvene those people again
18 because a change has occurred. I can't ignore it, and I
19 have to open it up to the people again to say look, here's a
20 new rule from MSHA.

21 Maybe my case is different than another company
22 that's located just several, you know, miles down the road,
23 but this is how it affects me and my operations and the way
24 I manage my people, and it might be different from other --

1 MR. NICHOLS: Why do you have to open it up again?
2 I can't imagine if you --

3 MR. SANDBROOK: Because if I don't that would be
4 micromanaging my people, and I don't do that.

5 MR. NICHOLS: If you have it covered in your OSHA
6 HazCom program, I can't imagine some substance being out
7 here in one of these rock quarries that you haven't already
8 covered and that your own experience and understanding of
9 your operation should not require you to change.

10 I mean, you adjust your training as you go. I
11 mean, you don't need to teach these mining people about
12 something they're not exposed to. I mean, that sounds like
13 part of your confusion on this.

14 MR. SANDBROOK: No. They're taught what their
15 exposures are. They're also taught how to read material
16 safety data sheets. You're right. There's not much
17 difference, what you're saying, going through here.

18 As far as the burden, again I now have -- there's
19 one more vehicle for an inspector to come in and take a look
20 and say okay and start asking and talking to my people,
21 double checking the training records with Part 46, was this
22 covered in the Part 46, double checking the inventory of the
23 hazardous materials to the number of material safety data
24 sheets and do the material safety data sheets meet up with

1 the hazardous -- it's going to be a nightmare. It's going
2 to be a nightmare.

3 MR. FEEHAN: Steve, I can almost guarantee that if
4 you're in compliance with OSHA, you're in compliance with
5 our standards.

6 MR. SHARP: Except for hazardous waste, which is
7 not covered in OSHA's HazCom?

8 MR. FEEHAN: You have hazardous waste?

9 MR. SHARP: Except for MSHA PELs on MSDSs, which
10 are not required by OSHA, for example. Except for the fact
11 that you may have to change the training plan under Part 46.

12 MR. FEEHAN: Let me correct something. First of
13 all, you're only required to put MSHA's PEL on MSDSs that
14 are your product.

15 MR. SHARP: We understand that.

16 MR. FEEHAN: Okay.

17 MR. SHARP: We understand that.

18 MS. HUTCHISON: And we already got a comment you
19 said --

20 MR. FEEHAN: Yes.

21 MS. HUTCHISON: -- that explained that you needed
22 to have the OSHA PEL for OSHA downstream users.

23 MR. SHARP: Right. Right, but I'm telling you
24 that if we have to develop material safety data sheets, and

1 it sounds like we're going to have to if we have crystalline
2 silica in our product. We've got to put an MSHA PEL on it,
3 and if we already have an MSDS instead of the OSHA PEL we've
4 got to make a change.

5 MR. FEEHAN: We're going to develop a generic MSDS
6 for silica. We'll give you that one, Jim.

7 MR. NICHOLS: No, we're not.

8 MS. HUTCHISON: No, we're not.

9 MR. FEEHAN: We're not?

10 MR. NICHOLS: No, we're not.

11 MR. FEEHAN: Let me ask. Doesn't NSA already have
12 a generic MSDS for crushed stone?

13 MR. SHARP: Yes, we do that we need to update now
14 based upon this standard --

15 MS. HUTCHISON: Why?

16 MR. SHARP: -- for paperwork purposes.

17 MS. HUTCHISON: What about it has to change?

18 MR. SHARP: I'm sorry?

19 MS. HUTCHISON: What about it has to change?

20 MR. SHARP: Well, you're saying that we have to
21 take the most recent IARC ruling, the most recent NTP. NTP,
22 as you not, just declared this a most likely carcinogen this
23 May 15. NTP. So there's a change.

24 MS. HUTCHISON: Well, what --

1 MR. SHARP: I'm answering your question, Cherie.

2 MS. HUTCHISON: Okay.

3 MR. SHARP: ACGIH has just lowered the PEL to .05
4 and called it a suspect carcinogen. We've got to make that
5 change. We've got to put your PEL on it.

6 MR. FEEHAN: Wouldn't you have to do that for OSHA
7 anyway?

8 MR. SHARP: Yes, but we've got to put your PEL on
9 it. That's a change. That's one of the reasons that this
10 standard is not the same as OSHA.

11 MS. HUTCHISON: But if you didn't have to put the
12 MSHA limit on the MSDS, you wouldn't have to change it?

13 MR. SHARP: No. That's not so. That's not so
14 because you're saying that we have to keep the reference
15 levels for ACGIH, NTP and IARC. Every time they make a
16 change, we've got to change our MSDS.

17 MS. HUTCHISON: No. That's not what we say.

18 MR. SHARP: That is what you say.

19 MS. HUTCHISON: No, that's not what we say.

20 MR. FEEHAN: What do we say?

21 MR. SHARP: Yes. What do you say? This is
22 enlightening.

23 MS. HUTCHISON: Okay. We say that if ACGIH, NTP
24 or IARC list it as a hazardous chemical, you have to

1 consider it to be hazardous. We also say that if they
2 classify it as suspected, probable or whatever terms they
3 use human carcinogen, you have to identify it as such.

4 MR. SHARP: Right, and as Table --

5 MS. HUTCHISON: That's it.

6 MR. SHARP: Table 4711, page 59097. It says
7 ACGIH, NTP and IARC latest edition.

8 MR. FEEHAN: Right.

9 MS. HUTCHISON: That's what you have to check, to
10 find out if it says it.

11 MR. SHARP: A small line operator has got to buy
12 the ACGIH TLV book for \$30, read it and understand it?

13 MS. HUTCHISON: Well, what chemicals --

14 MR. SHARP: He's got to buy the IARC, and he's got
15 to buy the NTP?

16 MS. HUTCHISON: What chemicals is he producing
17 that he would have to look up?

18 MR. SHARP: Crystalline silica.

19 MS. HUTCHISON: He already knows that that's
20 hazardous.

21 MR. SHARP: But he's got to check the book to see
22 if it changes because I just got done telling you that ACGIH
23 recently made a change, and so did NTP. He's got to keep
24 monitoring that.

1 Let me change the discussion to this. Let me put
2 something on the table.

3 MR. FEEHAN: Yes, but let me bring up --

4 MR. SHARP: Let me put something on the table for
5 you.

6 MR. FEEHAN: Wait a minute. Let's give you all
7 that. You're only talking about one MSDS sheet here.

8 MR. SHARP: Well, there could be more. I need the
9 small operators to come tell you that. There could be more.
10 I told you. I'm not a safety and health professional who ha
11 to implement this program. Let the small operators come and
12 tell you. I asked 11 to come. Only one could make it. The
13 other ten, on such short notice, were unable to do so.

14 Let me make a suggestion to you where we could
15 have a basis for discussion of this rule. Number one,
16 exempt office employees from this rule. If you can show
17 through your significant risk table and charts that office
18 employees -- that there's a significant risk other than a de
19 minimis risk to office employees, then we will consider
20 having them included in a HazCom rule. Right now we just
21 don't believe there is that risk. I doubt anybody has
22 suffocated, choked, strangled on toner from an office copier
23 machine or white out. I just doubt it. That's number one.

24 Number two, operators with some sort of reference

1 benchmark, either number of chemicals, not needing to
2 produce an MSDS or whatever, should be exempt from this
3 rule. If they have a small number of chemicals, for
4 example, as you have. Marvin, in your example, if they have
5 a small number of chemicals or something, some kind of a
6 reference, you need to think about exempting small
7 businesses from this rule if they show that they don't have
8 enough hazardous chemicals to really constitute a problem.
9 That's the second thing I think you need to consider. Those
10 two things.

11 Third, you need to think about no written program
12 for some. If there is no need for HazCom at a site, there
13 should be nothing required at all. No written program.
14 Nothing at all.

15 MS. HUTCHISON: Do you have any sites that do not
16 have any hazardous chemicals?

17 MR. SHARP: I want my small operators -- I haven't
18 had a chance to poll them, Cherie. You haven't given me the
19 time.

20 MR. FEEHAN: What was the third --

21 MS. HUTCHISON: Suggestion?

22 MR. FEEHAN: What was the third comment?

23 MS. HUTCHISON: No written program if there are no
24 hazardous chemicals.

1 MR. SHARP: The third thing is that I'm bothered
2 by the fact that you require something even from a site that
3 may have no hazardous chemicals. You're still requiring
4 them to have a written program. I can tell you that that's
5 a useless exercise. That's just useful. That's of no
6 benefit at all. It just makes people angry with you.

7 Those are the three things, and the fourth thing I
8 would ask you is if you're going to have this, have it
9 totally in compliance with OSHA. Have it mirror OSHA. As
10 the record shows, your own research, and as Steve had
11 pointed out, there are a lot of organizations now that have
12 already got an OSHA HCS.

13 Now, OSHA -- I will tell you that OSHA's HCS did
14 not go through notice and comment, not for the entire
15 general industry. It did not go through notice and comment.
16 It only went through notice and comment for CIP codes 20 to
17 39, but I would say that would be a basis for discussion in
18 this labor/management/government work group that I think you
19 should convene to hash through all this.

20 MR. SANDBROOK: Like Jim said, you already have
21 facilities that may be in compliance with an OSHA HCS like
22 myself. Now I have to go take and look at my liabilities,
23 if there are any. I have to look. It takes time and
24 effort.

1 I think the industry -- I would be more receptive
2 to a mirror, a true mirror image OSHA HCS.

3 MR. SHARP: And then the last thing I'd like to
4 add is we need to burrow into this harmonization, this
5 system harmonization initiative here, because if go through
6 to put out a rule that two years from now has got to be
7 changed, you're just irritating people, especially when the
8 record clearly shows that that initiative is going on now.

9 They are going to harmonize the material safety
10 data sheets probably according to ANSI, I mean, and the
11 labeling is going to be harmonized. I think you're shooting
12 yourself in the foot if you put out a rule and two years
13 later have to readopt it. I think we need to get from OSHA,
14 which is the lead agency on that internationally or
15 representing the United States. We need to find out where
16 this stands and try to bring all this together.

17 MS. HUTCHISON: We've already done that.

18 MR. SANDBROOK: You have talked to them?

19 MS. HUTCHISON: Yes, we have.

20 MR. SANDBROOK: And may I ask their response if
21 you were to become part of the globalization?

22 MS. HUTCHISON: A long time in the coming.

23 MR. SANDBROOK: I'm sorry. I don't understand.

24 MR. SHARP: A long time coming. How long? Did

1 they give you -- five years? Ten years?

2 MS. HUTCHISON: No. I don't remember.

3 MR. SHARP: They can't give you that estimate?

4 MS. HUTCHISON: I don't remember.

5 MR. SANDBROOK: To allow you to work with them on
6 this project?

7 MR. SHARP: Well, no. OSHA is doing that now.

8 MR. SANDBROOK: Right.

9 MR. SHARP: It's just that it takes time to work
10 out. You've got the United Nations, basically 200 countries
11 that you've got to work with. It's just like the global
12 warming thing. I mean, it's going to take a lot of hashing
13 through to get something worked out.

14 MS. HUTCHISON: They are --

15 MR. FEEHAN: I wouldn't mind --

16 MS. HUTCHISON: They are arguing about the like
17 terminology --

18 MR. SHARP: Right.

19 MS. HUTCHISON: -- for hazardous chemicals, toxic,
20 highly toxic, most highly toxic, even more highly toxic --

21 MR. SHARP: Right.

22 MS. HUTCHISON: -- and probable or possible or
23 potential.

24 MR. SHARP: Well, you know, I think we ought to at

1 least get a status report on where they are.

2 MR. NICHOLS: I think what we ought to deal with
3 is --

4 MS. HUTCHISON: We addressed this in the preamble
5 to the interim final rule.

6 MR. NICHOLS: What we need to deal with is what
7 we've got in front of us. MSHA has a rule here that can
8 still be adjusted. We think it's a good rule. We think
9 it's simple, straightforward. We don't think it's overly
10 burdensome to the industry just for the simple fact that
11 miners do have the right to know about a chemical hazard
12 that they may be exposed to.

13 MR. SHARP: We don't dispute that.

14 MR. NICHOLS: It's not that you have to go out and
15 reinvent the wheel either.

16 MR. SHARP: We don't dispute that principle
17 either.

18 MR. NICHOLS: What?

19 MR. SHARP: We don't dispute that principle
20 either.

21 MR. NICHOLS: Okay. Maybe we're going to get
22 somewhere here.

23 MR. SHARP: That's right. That's why we've got to
24 get this work group sitting around a table and talking.

1 There's a lot of common basis for consensus now.

2 MR. NICHOLS: Jim, I don't disagree with any of
3 that, but what you're saying to us is that our 25 years of
4 inspecting these small sand and gravel quarries leave us
5 with no idea what's out there.

6 I don't think that there's any mystery as to
7 what's on these mine properties that some group of small
8 mine operators are going to come in and tell us about. I
9 mean, we've named a dozen, and I'll bet you the list don't
10 go much farther than that.

11 MR. SHARP: Well, you know, I guess if I were
12 doing this rule I would have found that out for myself.

13 MR. NICHOLS: I think we have. I think we --

14 MR. SHARP: Well, where is that evidence, and why
15 hasn't it been put into the record then and shared with us?

16 MR. NICHOLS: I think our evidence is just what I
17 said; that we've been inspecting these places twice a year
18 for 25 years, and --

19 MR. SHARP: And you did an inventory of their
20 hazardous chemicals?

21 MR. NICHOLS: Well, you do a mental inventory of
22 the whole place. You've got a few dump trucks. You've got
23 a few crushers. You've got a shop. You've got a few labs
24 here strung around here.

1 MR. SANDBROOK: Would you know the citation rates
2 on the issuance of 56 or 57.16004, 20011 or 20012? The
3 citation rates?

4 MR. NICHOLS: Can you say that again? I was --

5 MR. SANDBROOK: The citation rates, okay, issued
6 across the country for say just the past even five to six
7 years or longer to 12 years of the Part 56 --

8 MS. HUTCHISON: The labeling requirements?

9 MR. SANDBROOK: The labeling of the containers of
10 hazardous materials, barricades and warning signs and
11 labeling of toxic materials relevant to this. Do we have
12 those citation rates to see is there a problem out there?

13 MR. NICHOLS: It's pretty easy to retrieve it. I
14 don't know if it's in the record or not.

15 MR. SHARP: Marvin, I hear what you're saying.
16 You have a point of view, and obviously we spent 18 pages
17 giving you our point of view. That was a point of view that
18 was a rush that we never really had a chance to poll our
19 small people, and that's what we would like to have the
20 opportunity to do in order for this to be the kind of
21 thoughtful rule making we know MSHA wants to promulgate here
22 and that we want you to promulgate. It's in our best
23 interest, too.

24 You know, we have a lot more in common here than

1 you think, but this rule is not -- I'm telling you it's
2 another Part 48 safety training. It does not work. I'm
3 convinced of it based on what I'm reading. There's too much
4 paper, for instance. It does not work.

5 Now, please, let's not have another 20 year or 22
6 year mess like we had with Part 48. All we have to do is
7 sit around and talk and work this thing through.

8 MS. HUTCHISON: If our rule mirrored OSHA, how
9 would that help?

10 MR. SHARP: It would help.

11 MS. HUTCHISON: How?

12 MR. SHARP: Because these people like Steve
13 wouldn't have to do anything except extend the OSHA HCS to
14 his mining operation, which he may have already done.

15 MR. NICHOLS: That's all he has to do with this
16 rule.

17 MR. SHARP: That would help. That would help,
18 Cherie. I'm not telling you that that's the end of it
19 because you're asking me to speak for people that I haven't
20 had a chance to get their message from, the small operator,
21 because you haven't given me the time to do that.

22 MR. TEASTER: Steve, some of regulations you
23 referenced, 56.20011, for example, which requires posting or
24 barricading off the area where you have a hazardous material

1 and you'd have to put a sign up posting that and also
2 notifying them of any personal protective equipment. Do you
3 have a lot of those signs posted on your mine property today
4 that you're familiar with?

5 MR. SANDBROOK: Not in this industry, but when I
6 was in the cement industry, yes, and the thing with the
7 asbestos, which was --

8 MR. TEASTER: You know, we say this takes care of
9 a lot of stuff. If we go to a quarry today and apply the
10 rule as we proposed having an interim final rule, how many
11 of those areas today would be identified with this warning
12 or be barricaded off?

13 I mean, I'm just referring to going to the mine
14 site. I have not seen a lot of those posted on the mine
15 sites. I think if you go back to this chemical here,
16 there's at least some areas. The number we don't know
17 exactly. There's talk about six, 12 or whatever, but I've
18 never been on a mine site where I've seen anything close to
19 that many areas being dangered off as being hazardous
20 material and specifies what personal protective equipment.

21 MR. SANDBROOK: Again, in my industry, in the sand
22 and gravel and crushed and broken stone, you're right.
23 You're not going to find much of that. It's fairly inert.

24 If you start going to a lime plant or maybe a

1 cement plant where they're dealing with CKD, then you may
2 have another issue because of the high chrome levels.

3 MR. TEASTER: I recognize there are going to be
4 different, --

5 MR. SANDBROOK: Right.

6 MR. TEASTER: -- you know, chemicals at the mine.
7 For example, if you go to a processing plant or to a gold
8 operation it will be much different than going to --

9 MR. SANDBROOK: That's right.

10 MR. TEASTER: Thank you.

11 MR. SANDBROOK: So it's not just the crushed. I
12 mean, we're talking the whole mining community itself.

13 MR. NICHOLS: Jim, I don't get your point about
14 all this confusion between OSHA's rule and what we're doing
15 here. If you have an OSHA HazCom program, you ought to be
16 in compliance with MSHA with the exception of maybe where
17 they burn this hazardous waste, and that's only at cement
18 plants so I don't see that it's going to confuse the whole
19 industry.

20 MR. SHARP: If you want me to do a detailed
21 comparison of these two rules, you must give me the time to
22 do it. I had thought to do that. I simply had no time. I
23 mean, I thought to do it for the hearing, for the submittal
24 of comments on the 17th. I had no time to do it.

1 MS. HUTCHISON: If you had one, would it be
2 helpful?

3 MR. SHARP: If what?

4 MS. HUTCHISON: If you had one --

5 MR. SHARP: Yes, because I'm sure you've already
6 done it. Yes, it would be helpful, but I can tell you that
7 we would have objection to the written program requirement
8 under HazCom, OSHA HazCom, based upon experience.

9 It is a three or four page document that ends up
10 in a file that nobody ever refers to. Never refers to. We
11 would have trouble with that paperwork burden as we would
12 classify it simply because we do not see that it brings
13 anything to the table in terms of improving safety and
14 health, and it does give you a wonderful opportunity to cite
15 us, as OSHA took ready advantage of in its HCS, as you well
16 know.

17 Secondly, OSHA's HCS -- the difference between the
18 general industry, and there are numerous difference between
19 the general industry and the mining industry, but one of
20 them is in the requirement for training we have had that
21 requirement on the industry from day one, most appropriate,
22 and we agree with it. We have it to this day. We would
23 want to have some kind of a change from the OSHA training
24 requirement because we already are under a separate training

1 requirement.

2 Now, maybe there needs to be some tweaking there.
3 You say you think it's essential to emphasize chemicals in
4 safety training. My initial reaction to that is I doubt
5 really whether you need to do that. You have it covered
6 under new miner training. You have it covered under newly
7 hired experienced miner training. You have it covered under
8 refresher training. You have it covered under task
9 training. It's all health and safety issues, and that
10 includes chemical. I just don't see that point. That's a
11 matter for discussion. It's truly a matter for discussion.

12 The third issue is the labeling issue. You've got
13 labeling requirements now. We would wonder why you would
14 need to change the labeling requirements that you have now,
15 but we would like to hear your point of view, and I'd like
16 you to hear the point of view of small business, large
17 business and labor, so there's your areas that I think we
18 can talk about.

19 MR. FEEHAN: So, Jim, you'd like us to mirror
20 OSHA's HCS exactly except you don't want to have a written
21 program, and you want to have different training?

22 MR. SHARP: And the labeling.

23 MR. FEEHAN: And the labeling.

24 MR. SHARP: And the labeling.

1 MR. FEEHAN: I'd say we're a lot closer to OSHA
2 with what we got than what you want to do.

3 MR. SHARP: Richard, you're hearing Jim Sharp
4 talk. Jim Sharp has not heard from his small businesses.

5 MS. HUTCHISON: You haven't heard from any?

6 MR. NICHOLS: Did you hear from any of them when
7 we were back in the early stages working on this?

8 MR. SHARP: I wasn't around in the early stages.
9 I've only been here since 1998.

10 MR. NICHOLS: What we tried to do with the rule is
11 develop a minimum rule that would give miners the
12 opportunity to know a chemical that they may be exposed to,
13 and we've tried to structure it in a way that can be fit
14 into already existing requirements in MSHA, like the
15 training.

16 It's going to take a little bit of work for all
17 these MSDSs to get together, write a program, and I said up
18 front a couple times that MSHA is going to be ready and
19 willing to assist in doing this, and it can be -- your
20 training can be in your training cycle during the year. I
21 just don't get the burden argument, Jim.

22 MR. SHARP: Marvin, I don't know how I can state
23 more than I've spent the last hour stating it.

24 MS. HUTCHISON: Is it the burden --

1 MR. SHARP: What I have said to you is that I hear
2 your point of view. You have heard our point of view as we
3 expressed it in the 18 page response. You've heard it in
4 the one we submitted in 1999, but what I'm telling you is I
5 want you to hear from the little guy.

6 I want you to hear from the same little guy you
7 heard from when you did Part 46. I want you to have his
8 perspective because, Marvin, I'm sorry. I really don't
9 think you have it because I don't even have it, and I'm
10 closer to them than you are.

11 MR. NICHOLS: Well, you've been to one of those
12 places.

13 MR. SHARP: Of course I've been to them, but I
14 haven't been to them to say all right, let's talk about
15 HazCom. Let's do an inventory. Let's talk about a written
16 program. I haven't done any of that. I haven't had time.

17 MR. NICHOLS: Okay. We've got your comments, and
18 we'll review --

19 MR. SHARP: One final statement.

20 MR. NICHOLS: Okay. Please.

21 MR. SHARP: You're not the bad guy. We're not the
22 bad guy. Labor is not the bad guy. We all have one thing
23 in common here. We want to assure a safe and healthful
24 workplace. Chemicals, many of them are hazardous. There

1 needs to be an information and dissemination requirement out
2 there for miners, just as there is for general industry.

3 We want to work with you and labor to craft such a
4 regulation, if you will, but I would rather call it an
5 alternative. I can tell you that the mining industry cannot
6 at this juncture stomach your interim final rule in its
7 current form.

8 MR. NICHOLS: Okay. Thanks.

9 MR. SANDBROOK: Thank you very much.

10 MR. NICHOLS: Has Michael Sprinker shown up yet?

11 MR. SPRINKER: Yes, I have.

12 MR. NICHOLS: Are you going to be available after
13 lunch, or do we need to go ahead?

14 MR. SPRINKER: I need to go to another meeting. I
15 didn't realize that the Stone Association was going to have
16 an hour to speak.

17 MR. NICHOLS: We'll give you all the time you
18 want.

19 MR. SPRINKER: I don't need more than about ten
20 minutes.

21 MR. NICHOLS: Have a seat. You're just the kind
22 of guy we're looking for.

23 MR. SPRINKER: Thank you. My name is Michael
24 Sprinker. I'm the health and safety director of the

1 International Chemical Workers Union Council of the United
2 Food and Commercial Workers Union. I'm a certified
3 industrial hygienist. I've been at my job just about seven
4 years there.

5 Before that time, I had close to ten years as an
6 OSHA compliance officer in the Oregon state plan as an
7 industrial hygienist throughout all the years of the HazCom
8 program, in fact, and also spent a couple of years in the
9 former Yugoslavia doing some research and such and talking
10 to companies and workers and so on on some of these very
11 similar areas.

12 Anyway, we just have a few comments today.
13 Actually, I'm very happy to hear that maybe we can expect
14 some help getting increased funding for MSHA to write new
15 rules it sounds like from industry since they're concerned
16 you don't have enough staffing time, so I do expect that in
17 the next Congress, some help that way. I'll be sure to be
18 calling on them to come up with their words.

19 One of the issues with Part 46, which I think
20 since that was the subject of extensive comments here, was
21 that for a long time miners in those industries were
22 prevented by a rider in Congress, which certainly didn't
23 have the support of the Chemical Workers Union, from getting
24 training. It was always so interesting to see on some of

1 those fatality reports people were -- you know, those people
2 had to be trained.

3 Truthfully, I'm happy MSHA took time and got
4 through Part 46 quickly because who knows what the next
5 Congress would have done. I expected that rider to go back
6 on at some point.

7 We do feel this rule was long overdue, too, for a
8 lot of reasons. I mean, you had 12 years there between
9 1981, January 20, 1981, and January 19, 1983, when basically
10 you, OSHA and so on were agencies that were not wanted, not
11 supported except very minimally when things would blow up by
12 two Administrations, two Administrations that didn't want to
13 see you change and so on, so we understand why this has
14 taken a long time, but we do believe it is overdue.

15 I only hope for the sake of my members that this
16 rule will not be held up by hostile members of Congress, and
17 I realize this isn't so much an issue for MSHA, but I'd like
18 to have this on the record, as the OSHA ergonomic standard
19 has been and as so many other standards have been; for
20 example, training for miners in those "exempt" industries.

21 We believe that any employer who cares in the
22 least about his or her employees should have no objection to
23 the goals of this rule and even to much of this rule. In
24 fact, we feel the rule doesn't quite go far enough in some

1 cases.

2 Those who believe they shouldn't have to train
3 employees, maintain MSDSs, label containers properly, make
4 MSDSs available to miners and miners' representatives and
5 health care providers and not improperly employ trade
6 secrecy don't deserve the privilege, and you note I said
7 privilege and not right, to employ anybody for any purpose.
8 Those that don't want to deal with health and safety,
9 protect the health and safety of their work force,
10 truthfully we feel shouldn't be in business.

11 Now for some comments about the rule. Some of
12 these comments will mirror some of what the mine workers
13 have said earlier. Some don't, and I'll make some things in
14 a little bit further detail by the 19th. Certainly the
15 requirement for a HazCom program.

16 We do feel that mine operators -- in fact, I doubt
17 there would be very many mine operators that do not have
18 some hazardous chemicals on site. I've seen hazard
19 communication programs which met the requirements of OSHA
20 which were one page long, and we're not talking fine print
21 either. We're talking 14 point with a lot of white spaces
22 there.

23 In here a lot you have a lot of the comments about
24 known to be, when hazardous chemicals are known to be at the

1 mine, and we think those words are quite redundant and
2 really give a way for some employers who don't want to
3 provide that to say I didn't know that was there. I didn't
4 know that those ten 55 gallon drums of trichlorethylene were
5 there. I forgot all about them. No one told me. In some
6 cases, for example, maintain the written program for as long
7 as the hazardous chemical is at the mine. It doesn't mean
8 known to be at the mine.

9 With the HazCom program contents, we believe there
10 should be some statement from the company as to who the heck
11 is in charge of the program. That's one of the problems we
12 see in a number of sites where it appears nobody is in
13 charge of anything when it comes to health and safety or
14 when it comes to maintaining MSDSs and so on. It doesn't
15 necessarily have to have a title of the position.

16 Label containers. We believe that the three month
17 time span for an employer to update a label may be a bit too
18 long. Sometimes there might be reasons why it might take
19 that long, but we think that should be the real exception.

20 With label contents or label alternatives, I'm not
21 too happy with the label alternatives. If you were to have
22 wording in there which said that that information was as
23 accessible as a label on the container would be, then that
24 might be more acceptable to us. I've just seen too many

1 cases where label alternatives were used as a way to keep
2 information away from employees.

3 I've seen a lot of places where MSDSs are
4 routinely looked for. The places where you find they're not
5 looked through is when they're in such a rambling order that
6 you can't find anything in those books, in those lists of
7 MSDSs that employers have.

8 With the issue on temporary portable containers,
9 I'm very uncomfortable with this. We certainly in general
10 industry have seen cases where it's very hard to insure that
11 one person is using that container all shift and that's it.

12 I've seen cases where someone inadvertently pours
13 the wrong thing into a container. Think of the situation
14 where someone has ammonium nitrate in a small container for
15 some reason. They're just going to use it for a little
16 while. The next day someone comes and says I've got to pour
17 this solvent into something. Then what do you have happen?

18 I think this could create some hazards, and a lot
19 of places I know of don't even -- they'd just as soon have
20 if you've got something you're going to put xylene in and
21 maybe use it for the shift or some other solvent, it's
22 labeled as that. For one thing, you don't often want many
23 things mixed anyway just for quality purposes. Again, with
24 the three month requirements for updating MSDSs, we believe

1 that when the employer receives or the operator receives a
2 new MSDS it should go into the book.

3 Also, even maintaining those MSDSs. Products
4 change a lot over time. Manufacturers are always changing
5 or I shouldn't say always, but often changing their
6 products. We've had products that used to have, for
7 example, silica in it. Now they don't have it. All of a
8 sudden the record that a person maybe ever was exposed to
9 something that had it, that Compound XYZ once was 30 percent
10 silica and now it's 30 percent talc, you know, or some other
11 compound or some much more amorphous compound. That
12 information may be totally lost. We like the OSHA language
13 better on this rule on maintaining MSDSs.

14 We're happy to see the MSDS requirement for
15 hazardous waste. We wish OSHA had that. We think one is a
16 long time coming, and it's a particular problem in minds
17 where, let's face it, either things are burned or they're
18 used for other purposes.

19 I think, too, to a large degree there's going to
20 be a protection for the operator, too, because if someone is
21 going to send some, if you would, hazardous waste over and
22 they've got to provide an MSDS, are they as likely to be
23 sending, you know, just some junk that they've got piled up
24 in the back, or are they actually going to -- it's more

1 likely you're going to end up with something from a
2 reputable company if they've got to provide an MSDS.

3 With HazCom training, here, too, we see and
4 certainly under OSHA if someone already has the HazCom
5 training, they're getting it through other means or
6 whatever, it doesn't add a great burden on. If someone
7 already has that training, there's not a need to repeat it.

8 The question I have, and maybe a little
9 clarification here, in the situation when training is needed
10 you may be wanting I think some language that says whenever
11 a miner's duties or job assignment changes. Here it talks
12 about work area. That could be interpreted maybe too many
13 ways.

14 One of the things I found dealing with a lot of
15 small businesses when I was with Oregon OSHA was that people
16 actually liked rules that explained things to them, that
17 gave them the -- that they didn't have to do a whole lot of
18 interpretation on. You'd get times where why doesn't it
19 just say that? You know, work assignment? Work area? Why
20 didn't you just say when job assignment changes?

21 The other thing, too, is I think training -- you
22 don't have anything in here which really talks about the
23 need so much for repeat training, which really comes about
24 when an operator becomes aware that a miner or other worker

1 appears to be unaware of the hazards, and that is, I think,
2 an important point in there unless you go to yearly training
3 and so on.

4 You may want to put in some words of explanation
5 here that look, if this is covered already under Part 46
6 training or so, then, you know, as long as you're covering
7 these elements you don't have to go about and repeat it. It
8 already counts.

9 MR. FEEHAN: I think that's in there.

10 MR. SPRINKER: Okay. I may have missed that in
11 there. Good.

12 47.52, HazCom Training Contents. One of the
13 things I'd like to see under (h) where they talk about
14 specific procedures, work practices and so on that are at
15 the mine something about how -- some training on how those
16 things are maintained or how the employer is assuring that
17 those are working properly. A lot of times people don't
18 understand if you close a blast gate slightly you make throw
19 off the entire system, the entire dust collection system for
20 a number of operations, or certainly for the one you're at.

21 We agree, too, that providing labels and MSDSs for
22 customers shouldn't be on request. It should just
23 automatically go out with things. Truthfully, I think it's
24 going to be it's one less piece of paperwork for someone to

1 have to get a request from someone and then fill it. You
2 just put it on there and send it out. It's done with.

3 The OSHA language there which says that, for
4 example, you only have to provide one every time when you
5 have a change in that MSDS rather than sending it out each
6 time, although again a lot of manufacturers, even small
7 ones, have found it so much easier just to send the darn
8 thing out with each one.

9 Let's see. Under the hazardous chemical trade
10 secrets, we're somewhat -- Part 4(c) where it says they
11 don't have to disclose process or percentage of mixture
12 information which is a trade secret. That can cause some
13 problems. For example, if you look at sulfuric acid, there
14 are different PPE requirements, personal protective
15 equipment requirements, for different concentrations. Some
16 things just don't work well.

17 It's also an issue, too, even for people
18 installing piping and other things. If you don't know what
19 mixture you've got, what may last a long time with some
20 concentrations may last only months with other
21 concentrations, could create a significant problem.

22 Disclosure in a medical emergency. We hope by
23 written, and this may need some clarification probably in
24 the rule. What about faxes and e-mails? I mean,

1 emergencies. You don't have time to send a letter. You
2 want to make it clear that, you know, a valid request from
3 someone shouldn't have to wait until they get a letter from
4 someone to fulfill it.

5 I was somewhat confused on the request, too, for
6 non-emergency disclosure, and I think this may provide some
7 confusion to some folks, when they talk about what you need
8 -- what the request needs to describe. You list a number of
9 different things. I wouldn't think that one would have to
10 address each and every one of the things if all you're
11 wanting is one particular area, but I think some wording
12 clarification in there could help.

13 Other than that, that is pretty much all of our
14 comments. While we in the Chemical Workers don't mind
15 meeting and such over rules and discussing rules and so
16 on, let's face it. Labor is a small business, too, and we
17 don't always have the time to go to a lot of meetings.

18 We don't feel that MSHA needs to remand the
19 standard back to look over it again. Some of the things
20 that were brought up can clearly be dealt with even through
21 interpretation or the information be provided employers.

22 Truthfully, too, there's always a lot of talk
23 about the burden on management. At times there are burdens
24 on management. That's true, but there's also the burden on

1 miners and their families who are hurt on the job, who come
2 down with silicosis, who maybe are dealing with multi
3 national employers who don't see the need to even monitor
4 and, you know, won't provide information to workers now when
5 they request it. You know, who pays the burden for that?
6 Often times it's not even workers' comp. Often times it's
7 maybe welfare, maybe unemployment, maybe private charities
8 and so on.

9 I think one of the most wonderful things about the
10 Mine Act is that it does talk about that there is a --
11 truthfully, that this country owes it to the people that are
12 mining materials to help them to survive each day so that
13 they come home in as good a shape as when they left home
14 that morning to go to work or before shift.

15 Thank you. If there are any questions, I'd be
16 very glad to answer any of them.

17 MR. NICHOLS: Are you going to leave anything with
18 us?

19 MR. SPRINKER: I'll have to send that in to you.
20 I've been on the road so much. Too many fatalities to deal
21 with, unfortunately.

22 MR. NICHOLS: You can do that. I think we've
23 probably captured all the comments.

24 MR. SPRINKER: Okay.

1 MR. NICHOLS: Does anybody have a question of
2 Michael?

3 Okay. Thanks.

4 MR. SPRINKER: Great. Thank you very much.
5 Again, I apologize. The weather in Cleveland was not
6 conducive to air travel too much this morning.

7 MR. NICHOLS: That's okay.

8 MR. SPRINKER: Thank you.

9 MR. NICHOLS: That's all the people we had signed
10 up. Are there other people that would like to --

11 Bruce? Are you going to be here after lunch, or
12 do you want to do it now?

13 MR. WATZMAN: Well, If Michael said ten minutes,
14 I'll take five.

15 MR. NICHOLS: We may have some questions for you.

16 MR. WATZMAN: No, you won't have any questions of
17 me.

18 MR. NICHOLS: Come on up.

19 MR. SHARP: I'd like to come back again.

20 MR. WATZMAN: Wait a minute. If Jim is coming
21 back again, I want to be after him. He makes me look
22 moderate.

23 Thanks, Marvin. I'm Bruce Watzman with the
24 National Mining Association, and I just want to touch on two

1 things very briefly or three.

2 First, we were part of an industry coalition that
3 filed comments with National Stone - National Aggregates and
4 others. The comments on the substance of the rule are on
5 the record, and we'll let them stand as they do.

6 My first comment is that we sit here on
7 December 14 approximately one month before a new
8 Administration takes office, and there's a certain irony in
9 this hearing. It wasn't long after the current Assistant
10 Secretary took office that he talked about going out into
11 the field, talking to the people in the field, talking to
12 the miners and the operators. He followed that trend up
13 until this point.

14 You held repeated hearings in the coal fields and
15 the hard rock mining fields. You heard from the operators,
16 you heard from the miners, and you chose not to do it in
17 this case. I think that's a disservice, and I really
18 question why you've chosen to conduct this hearing under
19 such short notice, why you felt it was necessary so you
20 avoid challenges under the Administrative Procedures Act.
21 Is this just merely punching a ticket so that you avoid that
22 issue in litigation?

23 The second issue that I need to talk about is the
24 economic impact of this rule on the industry, and I have to

1 preface this by putting it in the context of all the rules
2 that have come out in recent times and those that will come
3 out in the not too distant future, we think.

4 Several years ago you issued a diesel safety rule
5 for underground coal. One of the things we did a year after
6 that rule came into place, because we believe that the
7 agency underestimates the cost of rules on the industry, is
8 we conducted a survey among our members to see what their
9 actual experience was in the costs that they had incurred
10 under that rule as contrasted to the costs that were
11 reflected in your final economic analysis documents.

12 I will tell you that the costs incurred by six
13 coal companies exceeded the total cost projected in your
14 rule. Now, these were not small companies. I will tell you
15 that. They were some of the largest coal companies
16 operating in this country, but they by no means reflected
17 100 percent of the costs incurred by the industry. They did
18 not account for all of the diesel equipment usage in
19 underground coal. I want to set that as an example of how
20 we've reviewed this rule.

21 We find that in looking at the economic analysis
22 that there was a lack of factual basis for representations
23 in the preamble to accompany the rule. The agency assumed,
24 if my memory serves me correct, that approximately 50

1 percent of mining companies complied with this standard
2 either by virtue of them coming under state right to know
3 laws where they operated or by virtue of their parent
4 companies coming under OSHA's hazardous communication
5 standard, yet we saw no basis for that. We feel that that
6 grossly overstates the degree of compliance that exists
7 currently in the mining industry, but that doesn't mean that
8 more shouldn't be done by mining companies. Clearly there
9 should.

10 To carry that forward, when you look at the annual
11 compliance costs that the agency assumes of \$5.7 million
12 annually across the entire mining industry, that works out
13 to \$270 per mining company. Now, it's difficult to do
14 anything for \$270 in this day and age. If you look at the
15 salaries that are paid in the industry, two hours of a
16 supervisor's time exceeds what you estimate will be the
17 costs incurred by mining companies. We think you have
18 grossly underestimated the cost.

19 Does this reach some magical number that will
20 trigger additional analysis? No, it probably doesn't, but
21 each one of these regulatory proceedings that have come out,
22 and they're all important, are imposing more and more costs
23 on the industry.

24 Regrettably, we look at each of these with

1 blinders on. We looked at noise. We're looking at HazCom.
2 We look at diesel particulate. We look at respirable coal
3 mine dust. Are each of these important? Yes, but in the
4 total sense they're imposing dramatic and great costs both
5 in terms of economic costs and time burdens on those in the
6 industry whose job it is to protect the safety and health of
7 miners.

8 The previous witness was exactly right. It's
9 becoming more and more difficult in the industry for the
10 safety and health professionals to determine where they
11 should put their needs, where they should commit company
12 resources and time allocation resources.

13 Something is getting cheated, given the current
14 array of issues that safety and health professionals are
15 facing, you know, and that's something that we as an
16 association, that our members and the safety and health
17 professionals struggle with every day. We don't adequately
18 account for the total picture, and that's something that we
19 need to do as we proceed down the road.

20 It's a disservice to everybody. It's a disservice
21 to the professionals that work in the safety and health
22 field. It's a disservice to the miners, and it's a
23 disservice to those who spend a lot of time and hard effort
24 in working on the proposals that you put forward. It just

1 in our estimation does not fairly and adequately reflect the
2 costs we incur both in terms of dollars spent and time
3 requirements to comply with the rules, in five minutes or
4 less.

5 Questions? Stunned silence? This is not like
6 you, Marvin, not to question me.

7 MR. NICHOLS: I don't think we're here to talk
8 about the totality of the regulatory process. I still miss
9 seeing the extra burden for the simple informational
10 standard that can be incorporated into your current
11 training.

12 MR. WATZMAN: You know, Marvin, I've sat in a lot
13 of public hearings with you, and, you know, you are a great
14 guy. You sit up there, and you present this in a very
15 innocuous way. This isn't that big a deal. On paper it may
16 not be, but for those who actually implement these programs
17 in the mines, which you don't do and which I don't do, all I
18 can do, as Jim does, is convey to you the message that they
19 relate to us. All we are is we are spokesmen for them.

20 I take it on good faith when they say that this
21 will impose significant time requirements and economic
22 burdens on the company. There are many companies who are
23 going to be starting from ground zero in putting these
24 programs in place.

1 During the limited reopening period, for example,
2 we, under National Mining -- I think it was National Mining
3 at that time. It may have been National Coal. I forget
4 what the timing was in relation to our merger. We filed
5 with the agency information we had received from a mining
6 company on the actual cost they are experiencing to comply
7 with a program.

8 Now, they have a program by virtue of the fact
9 that their parent company comes under OSHA, so the parent
10 company extended it to all of their operating subsidiaries,
11 so they're operating under a program. They're one of the
12 ones that won't incur additional cost, that have a program
13 up and running, but the costs were so dramatically different
14 from a \$270 annual cost, if that's the average it costs the
15 industry, that it belies comprehensive. It really does.
16 We're talking about ten to 20 to 30 times higher for a
17 program that they have up and running today.

18 You know, this is a company that's a large company
19 with a lot of resources to commit out of with a real
20 commitment to do the right thing, yet, you know, they look
21 at \$270 and say we wouldn't even begin to know what to do if
22 we were limited to a \$270 a year expenditure to update our
23 current program.

24 MR. NICHOLS: I'll bet you most of your members

1 already have a HazCom program that are just going to have to
2 spend some small amount of time in the training they already
3 do to cover potential chemical hazards at the mine sites.

4 Now, have you ever seen one of these rock quarries
5 that Jim and the guys are talking about?

6 MR. WATZMAN: There's one of those that's in close
7 proximity to where I live, so, yes, I've seen one of those.
8 Yes, I have.

9 MR. NICHOLS: It's not real complicated, those
10 shops. I don't know how many of these quarries will have
11 labs. I mean, that's the other place that you'd need to
12 probably deal with in your HazCom program, but they were
13 going to do the Part 46 training anyway.

14 MR. WATZMAN: Well, you know, I'll let Jim speak
15 to that because Jim represents that segment of the industry.
16 I don't. We were not participants in the discussion on Part
17 46 because by and large, and I won't say it's completely
18 exclusive, but, you know, very few, if any, of our members
19 fall into that category.

20 You know who ours are. Ours are the larger mining
21 companies in the country that produce gold and cooper and
22 silver and lead and coal, and they are large operations both
23 in terms of the magnitude of the mining operation itself and
24 the support facilities that are used at the mines, be they

1 smelters or coal preparation plants.

2 I will tell you, Marvin, that you would be
3 surprised that some of the large companies are starting from
4 square one in putting a program in place. They do not have
5 hazard communication programs in place. They do not have --
6 in some instances do not have operations in states where
7 they are required to do so currently.

8 They do not fall under OSHA, and this is going to
9 be -- they are going to be treading on new ground. For
10 those companies, the costs are going to be dramatic.
11 They're going to be dramatic.

12 MR. NICHOLS: Just to pull together the
13 information and incorporate it into the training program?
14 That's going to be dramatic?

15 MS. HUTCHISON: They already have it.

16 MR. WATZMAN: They don't have it in their training
17 program in the manner in which this rule lays out. Yes,
18 they do hazard training. Yes, they do task training.
19 That's an ongoing activity in every mining operation out
20 there, but does it cover every aspect of what's proposed and
21 the manner in which this rule lays it out? Absolutely not.

22 MS. HUTCHISON: How long do you think it would
23 take to cover the information that they don't cover already?

24 MR. WATZMAN: I don't know the answer. Should I

1 give you Jim Sharp's answer and tell you let's get out into
2 the field and meet with those companies and not hold a
3 hearing in Washington, D.C., on three days' notice? You
4 know, I don't know the answer to that, and I apologize for
5 being flippant, but I don't.

6 Jim is exactly right. You know, holding a hearing
7 here on three days' notice and going out into the field is
8 just wrong. It's just a disservice to those who need this
9 information and who you seek the information from.

10 MR. NICHOLS: Okay. Once you get this thing
11 developed and get it implemented it's pretty static, right?
12 I mean, you don't have a lot of changes in the process?

13 MR. WATZMAN: You may not have a lot of changes in
14 the process, but you're always looking around at new
15 solvents.

16 MR. NICHOLS: Yes.

17 MR. WATZMAN: I mean, there's a multitude of
18 those. Every vendor -- there are hundreds of vendors, and
19 they always want you to use their best and their latest and
20 their greatest and their favorite, and in the competitive
21 nature of this mining industry today if you can save a buck
22 a gallon, you're going to save a buck a gallon and make a
23 change.

24 MR. NICHOLS: Okay, but once you do that then

1 coming with that new product or a different product comes
2 the MSDS sheet.

3 MR. WATZMAN: Uh-huh.

4 MR. NICHOLS: The fact is that the process doesn't
5 change to the point that you're going to be producing new
6 chemicals, that you'd have to go research and develop your
7 own MSDS sheets. I mean, this is going to be a service
8 that's supplied. You know, the supplier is going to --

9 MR. WATZMAN: Well, I would agree with you in most
10 instances, but there will be instances where you will have
11 to go out and do research and be preparing your own MSDS.
12 You know, that's reflected in your rule. That's one of the
13 areas that we're concerned about, you know, when you're
14 talking about tailing ponds or waste, just the rock, the
15 waste, you know.

16 We're going to have to now produce MSDSs for our
17 workers who have worked around those materials from day one
18 when they came into the mine. They've been trained about it
19 continually, yet, you know, Jim Weeks talked about the
20 nature and that mine operators are now going to have to
21 identify what's a hazardous chemical, so there's going to be
22 a cost that they're going to have to incur in terms of going
23 out and preparing that information.

24 MR. NICHOLS: But in the tailing ponds, I mean,

1 it's just an aggregate of what you've used during the
2 process.

3 I mean, for the coal spill down in Kentucky we
4 didn't take very long to just --

5 MR. WATZMAN: What coal spill?

6 MR. NICHOLS: The sludge. It took no time to put
7 together the analysis of that sludge.

8 MR. WATZMAN: I think some are still analyzing
9 that today.

10 MR. NICHOLS: Okay.

11 MR. WATZMAN: Thanks a lot.

12 MR. NICHOLS: Thank you.

13 MR. WATZMAN: Thank you.

14 MR. NICHOLS: Jim, you're going to have to wait
15 until after lunch.

16 MR. SHARP: If that's the case -- am I the only
17 one?

18 MR. NICHOLS: How long are you going to be?

19 MR. SHARP: I'll waive my opportunity to speak if
20 the hearing is going to come to an end.

21 MR. NICHOLS: No, no. We'll be here until 5:00.

22 MR. SHARP: Oh, okay.

23 MR. NICHOLS: But we need to have lunch sometime.

24 MR. SHARP: Okay. I'll come back then.

1 MR. NICHOLS: Okay. You'll be first on after we
2 get back.

3 (Whereupon, the hearing in the above-entitled
4 matter was recessed, to reconvene this same day, Thursday,
5 December 14, 2000.)

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1 A F T E R N O O N S E S S I O N

2 MR. NICHOLS: Let's get started back.

3 Now, Jim Sharp has waived his testimony. Is that
4 right?

5 MR. SHARP: Right.

6 MR. NICHOLS: Okay. Is there anyone else that
7 would like to have any comments or further comments?

8 If not, some of us will be here until 5:00. We'll
9 go back on the record from time to time. If anybody comes
10 in we'll take their testimony and close up at 5:00.

11 Any of the MSHA folks that want to or need to go
12 back, why that will be fine.

13 (Whereupon, a recess was taken.)

14 MR. NICHOLS: It's 5:00 on December 14. We
15 haven't had anyone testify since before lunch and so we're
16 going to close the hearing.

17 (Whereupon, at 5:00 p.m. the hearing in the
18 above-entitled matter was concluded.)

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DOCKET NO.: --
CASE TITLE: Mine Safety Health Administration
Public Hearing
HEARING DATE: December 14, 2000
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Mine Safety Health Administration.

Date: December 14, 2000

Beth Roots

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