

# TRANSCRIPT OF PROCEEDINGS

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IN THE MINE SAFETY AND HEALTH ADMINISTRATION

In the matter of:                    )  
  )  
EXAMINATION OF WORKING            )  
PLACES IN METAL AND                )  
NONMETAL MINES;                    )  
PROPOSED RULE                        )

Pages: 1 through 39

Place: Pittsburgh, Pennsylvania

Date: November 2, 2017

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## HERITAGE REPORTING CORPORATION

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 PLACES IN METAL AND )  
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 PROPOSED RULE )  
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 )

Pittsburgh, Pennsylvania

November 2, 2017

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

Before:

SHEILA McCONNELL  
 Director  
 Office of Standards, Regulations and Variances  
 Mine Safety and Health Administration

KEVIN STRICKLIN  
 Acting Administrator  
 Metal and Nonmetal Mines  
 Mine Safety and Health Administration

BRAD MANTEL  
 Office of the Solicitor  
 Mine Safety and Health Administration

Speakers:

ERIC DOLAN, New Enterprise Stone and Lime Company, Inc.

JOSIE GASKEY, Pennsylvania Aggregates and Concrete Association

JULIO FOLHADELLA, Buzzi Unicem

ERNEST MIRANDA, Golder Associates



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P-R-O-C-E-E-D-I-N-G-S

MS. MCCONNELL: Good morning. My name is Sheila McConnell, and I am the director of the Office of Standards, Regulations and Variances for the Mine Safety and Health Administration. I am the moderator for this public hearing on MSHA's proposed rule on examinations of working places in metal and nonmetal mines, which was published in the Federal Register on September 12, 2017. On behalf of our Acting Assistant Secretary for MSHA, Wayne Palmer, I welcome all of you here today and thank you for your attendance and participation.

The purpose of this hearing is to receive information from the public that will help MSHA evaluate the proposed rule that would make limited changes to the Agency's January 2017 final rule on examinations of working places in metal and nonmetal mines. This is the last of our four public hearings. The first was held on October 24th at MSHA headquarters in Arlington, Virginia, the second on Thursday, October 26th in Salt Lake City, and the third on Tuesday, October 31st in Birmingham, Alabama.

I would like to introduce the members of

1       our panel. We have Kevin Stricklin to my right,  
2       Acting Administrator for Metal and Nonmetal Mine  
3       Safety and Health, and on my left, Brad Mantel  
4       from the Office of the Solicitor.

5               These hearings are conducted in an informal  
6       manner. Formal rules of evidence do not apply.  
7       The hearing panel may ask questions of speakers,  
8       and speakers may ask questions of the panel.  
9       Speakers and other attendees may present  
10      information to the court reporter for the  
11      rulemaking record. MSHA will accept comments and  
12      other information for the record from any  
13      interested party, including those not presenting  
14      oral statements. We ask everyone in attendance  
15      to sign the attendance sheet.

16              Before we start, I would like to provide a  
17      little background. On January 23, 2017, MSHA  
18      published a final rule on examinations of working  
19      places in metal and nonmetal mines. The  
20      effective date of the final rule was stayed until  
21      June 2, 2018. This January 2017 final rule,  
22      which strengthens and improves MSHA's existing  
23      requirements for metal and nonmetal examinations  
24      of working places, requires a mine operator to:

25              Have a competent person examine each

1 working place at least once each shift before  
2 miners begin work in that place;

3 Promptly notify miners in affected areas of  
4 any conditions that may adversely affect their  
5 safety or health;

6 Promptly initiate action to correct the  
7 adverse conditions;

8 Withdraw all persons from affected areas  
9 when alerted to any conditions that may present  
10 imminent danger, until the danger is abated;

11 Create an examination record before the end  
12 of each shift that includes the name of the  
13 person conducting the examination, the date of  
14 the examination, location of all areas examined,  
15 and description of each condition found that may  
16 adversely affect the safety or health of miners.  
17 The record must also include, or be supplemented  
18 to include, the dates of corrective actions  
19 taken;

20 Maintain records for at least one year,  
21 make such records available for inspection by  
22 MSHA and miners' representatives, and provide  
23 copies upon request.

24 The January 2017 rule retains several  
25 existing concepts, definitions and

1 responsibilities, such as the definition of  
2 competent person and working place, the  
3 conditions that may present an imminent danger,  
4 and the retention and availability of examination  
5 records.

6 For example, the term competent person  
7 continues to be defined as a person having  
8 abilities and experience that fully qualify him  
9 to perform the duty to which he is assigned. A  
10 working place continues to be defined as any  
11 place in or about a mine where work is being  
12 performed.

13 On September 12, 2017, MSHA published a  
14 proposed rule that would make limited changes to  
15 the January 2017 final rule. The limited changes  
16 being considered would require that:

17 An examination of a working place must be  
18 conducted before work begins or, as miners begin  
19 work in that place. The January 2017 final rule  
20 requires the examination be made before miners  
21 begin work in the working place.

22 The proposed change would provide operators  
23 additional flexibility in scheduling the working  
24 place examination by allowing miners to enter a  
25 working place at the same time that a competent

1 person conducts the examination. However, as  
2 noted in the preamble to the proposed rule, MSHA  
3 intends that the examination be conducted in a  
4 time frame sufficient to assure that any adverse  
5 conditions be identified and corrected before  
6 miners are exposed.

7 Like the January 2017 final rule, the  
8 proposed rule would continue to permit mine  
9 operators with consecutive shifts, or those that  
10 operate on a 24-hour, 365-day basis, to conduct  
11 the examination for the next shift at the end of  
12 the previous shift. As stated in the January  
13 2017 final rule, however, because conditions in  
14 mines can change, MSHA expects that operators  
15 will conduct examinations at a time sufficiently  
16 close to the start of the next shift to minimize  
17 miners' potential exposure to conditions that may  
18 adversely affect their safety or health.

19 And second, the examination record must  
20 include descriptions of adverse conditions that  
21 are not corrected promptly, and the dates of  
22 corrective actions for these conditions.

23 The January 2017 final rule requires that  
24 each adverse condition be documented in the  
25 examination record. The proposed rule, however,

1 would reduce the mine operator's record keeping  
2 burden by requiring that the examination record  
3 include a description only of each adverse  
4 condition that is not promptly corrected. A  
5 similar conforming change would require that the  
6 examination record include the dates of  
7 corrective actions for only those adverse conditions  
8 that are not corrected promptly. Therefore,  
9 under the proposed rule, when adverse conditions  
10 are corrected promptly, there would be no  
11 requirement that the examination record include  
12 descriptions either of those conditions that --  
13 either of those corrected adverse conditions or  
14 of corrective action dates for those conditions.  
15 MSHA interprets the term promptly to mean before  
16 miners are potentially exposed to adverse  
17 conditions.

18 The proposed rule would not change any  
19 other information to be included in the  
20 examination record as specified in the January  
21 2017 final rule.

22 We are requesting comments and information  
23 from the mining community only on these limited  
24 changes in the proposed rule; that is, the timing  
25 of the working place examination and documenting

1 adverse conditions and corrective action dates in  
2 the examination record, and how these proposed  
3 changes may affect the safety and health of  
4 miners.

5 We also request comments on all cost and  
6 benefit estimates presented in the preamble to  
7 the proposed rule, and on the data and  
8 assumptions the Agency used to develop these  
9 estimates. This includes the Agency's  
10 assumptions on the number of instances adverse  
11 conditions are promptly corrected, and time saved  
12 by not requiring these corrected conditions to be  
13 included in the record.

14 As you address the proposed limited changes  
15 either in your testimony today or in your written  
16 comments, please be specific. Specific  
17 information and supporting rationale helps MSHA  
18 produce a final rule that is responsive to the  
19 needs and concerns of the stakeholder community.

20 MSHA will make available a verbatim  
21 transcript of this public hearing approximately  
22 two weeks from the completion of the hearing.  
23 You may view the transcripts of all public  
24 hearings and comments on our website at [msha.gov](http://msha.gov)  
25 and on [regulations.gov](http://regulations.gov).

1           If you have a copy of your testimony,  
2           please give a copy and any submissions to the  
3           court reporter so that these can be appended to  
4           the hearing transcripts. Following this public  
5           hearing, you may also submit additional comments  
6           using one of the methods identified in the  
7           Addresses section of the proposed rule. All  
8           comments must be received by Monday, November 13,  
9           2017.

10           Again, if you haven't signed the attendance  
11           sheet, please do so.

12           Please be advised that on October 5, 2017,  
13           MSHA published a final rule to stay the effective  
14           date of the January 2017 Examinations rule to  
15           June 2, 2018. This delay will allow MSHA  
16           additional time and flexibility to provide  
17           compliance assistance to industry, and training  
18           to stakeholders and MSHA inspectors on the final  
19           requirements. Meanwhile, MSHA will continue to  
20           enforce the rule you've all been working under so  
21           far.

22           So with that, I would like to introduce our  
23           first speaker, Eric Dolan, New Enterprise Stone  
24           and Lime. Mr. Dolan, for the record, could you  
25           restate your name for the court reporter, and

1 spell your name and your organization's name?

2 MR. DOLAN: Certainly. Eric, E-r-i-c,  
3 Dolan, D-o-l-a-n. New Enterprise Stone and Lime  
4 Company, Inc. Do you want the spelling on that,  
5 as well?

6 MS. MCCONNELL: No.

7 MR. DOLAN: Good morning. Thank you for  
8 the opportunity to testify today. My name is  
9 Eric Dolan, I serve as vice president of  
10 corporate safety services for New Enterprise  
11 Stone and Lime Company, Inc. In this role, I  
12 oversee the safety and health interests for over  
13 500 miners employed at over 35 active sites  
14 located within Pennsylvania and Western New York.  
15 My corporation is also a long standing member of  
16 the National Stone, Sand and Gravel Association,  
17 or NSSGA, who represents the estimated 100,000  
18 miners from about 150 companies.

19 I also serve on NSSGA's occupational safety  
20 and health committee. I will be delivering key  
21 points on behalf of the NSSGA during my testimony  
22 this morning. While we are concerned about any  
23 need for a rule, we acknowledge the effort put in  
24 by the new Administration. There is some relief  
25 in the revised workplace exams rule proposal from

1 the earlier proposal, and believe this is a step  
2 in the right direction.

3           Additionally, we have not yet taken a final  
4 position on the rule. However, we are concerned  
5 with several provisions or aspects, upon which I  
6 will briefly touch this morning. Our industry  
7 has long been committed to workplace safety and  
8 health. This has been a guiding principle of our  
9 national association, NSSGA, for the past two and  
10 a half decades. And this commitment is  
11 exemplified in the degree to which we've reduced  
12 injuries in stone, sand and gravel operations.

13           For example, the operators within our  
14 industry have reduced the injury rate year over  
15 year for the past 16 consecutive years. The  
16 injury rate for stone, sand and gravel now stands  
17 at a record low of just 1.95 injuries per 200,000  
18 hours worked. While there are some interesting  
19 ideas in the September proposal, we remain  
20 concerned about significant new enforcement  
21 liability at a time in which our industry  
22 sector's performance has achieved record levels  
23 of injury reductions under the current standard.  
24 Accordingly, we are far from convinced that a new  
25 rule for workplace exams is needed or justified.

1           I will now provide an overview of eight key  
2 concerns regarding the proposed rule.

3           No. 1, the timing of the examinations. The  
4 initial version of the rule required that  
5 workplace examinations be conducted before miners  
6 begin work in that place. MSHA has proposed to  
7 amend the final rule such that examinations would  
8 be required before work begins, or as miners  
9 begin work in that place. The proposed amendment  
10 does not provide adequate relief for the  
11 following reasons:

12           First, it continues to unnecessarily  
13 constrain when operators can conduct their  
14 workplace examinations.

15           Second, operators need flexibility to  
16 conduct workplace examinations as circumstances  
17 dictate. Shifts are not typically uniform at all  
18 operations. Circumstances can change during any  
19 given shift, and the existing workplace  
20 examination standard provides the necessary  
21 flexibility.

22           Third, the phrase "that place" in the  
23 proposed amendment is unclear and could lead to  
24 confusion at the mine site. It raises  
25 uncertainty as to where specifically one should

1 examine to cover work that is to be done by an  
2 oncoming shift.

3 And fourth, the final rule with proposed  
4 amendment leaves too much uncertainty for  
5 enforcement.

6 The second concern is documentation. MSHA  
7 has proposed to reduce the documentation  
8 requirement of the final rule such that  
9 conditions that are found and promptly corrected  
10 would no longer need to be recorded, nor would  
11 their corrections. MSHA has advised that for  
12 purposes of this provision, promptly means before  
13 miners are potentially exposed to adverse  
14 conditions.

15 We do believe the proposed amendment is an  
16 improvement over the final rule, because a number  
17 of conditions typically found during workplace  
18 examination are able to be corrected during the  
19 examination.

20 I would like to offer an idea for the  
21 Agency's consideration. If any new workplace  
22 examination standard is to take effect, MSHA  
23 should consider further revising the  
24 documentation requirement such that conditions  
25 that are corrected during the shift on which they

1 are found should not be required to be recorded.  
2 This would further the intent of the amendment of  
3 only requiring recording of conditions that are  
4 unable to be corrected in a timely basis.

5 Operators are also concerned that the  
6 increased documentation requirement will lead to  
7 additional enforcement based solely on the  
8 examination records.

9 If any new workplace examination standard  
10 is to take effect, operators should be afforded  
11 maximum flexibility in the recording of  
12 conditions and corrections, including the use of  
13 work orders and existing electronic databases for  
14 documentation.

15 Third concern is costs. MSHA's accounting  
16 for costs of the final rule, even with the  
17 proposed amendments, does not appear to consider  
18 real world consequences of the new regulation.

19 It is expected that some operators will  
20 need to hire additional employees to manage the  
21 requirements of any new workplace examination  
22 standard.

23 Fourth concern is notification. The final  
24 rule with proposed amendments continues to fail  
25 to define what constitutes notification of

1 adverse conditions to affected miners.

2 Fifth concern is lack of benefits. The  
3 initial workplace examination final rule was not  
4 predicated on any finding of unsafe work  
5 practices with the existing workplace examination  
6 standard. It also could not identify any benefit  
7 to a new workplace examination standard,  
8 especially from a quality improvement  
9 perspective. The proposed amendments do nothing  
10 to remedy these issues, and there is additional  
11 concern that the initial final rule and proposed  
12 amendments could potentially have an adverse  
13 effect on the quality of workplace examinations.

14 Six, vague and unclear terms in provisions.  
15 The initial workplace examination final rule  
16 contained many vague and unclear terms in  
17 provisions. The proposed amendments do not offer  
18 any clarification of these terms. Vague and  
19 unclear terms include:

20 The term "working place", for purposes of  
21 Parts 56/57.18002(a). It remains troublesome  
22 that MSHA appears to consider areas commonly  
23 thought of as travelways as working places when  
24 the existing standard already differentiates  
25 between working place and a travelway within 30

1 C.F.R. 56/57.2.

2 The term "conditions that may adversely  
3 affect safety and health" for purposes of parts  
4 56/57.18002(a)(1). During the comment period,  
5 preceding promulgation of the final rule,  
6 commenters raised that this term was potentially  
7 ambiguous, yet MSHA did not provide definitional  
8 guidance for this term. This is especially  
9 problematic, because examining for conditions  
10 that may adversely affect health and safety is  
11 the touchstone of the entire rule, including the  
12 changes contemplated by the proposed amendments.

13 The term "promptly" for purposes of the  
14 notification requirement and remediation  
15 requirement of parts 56/57.18002(a)(1). This  
16 term is very subjective and could result in  
17 varying interpretations and enforcement.  
18 Additionally, although the proposed amendments  
19 provide some guidance as to the term promptly  
20 with respect to when conditions need not be  
21 recorded, that guidance remains subject to  
22 interpretation and requires greater  
23 clarification.

24 Finally, the term "initiate appropriate  
25 action" for the remediation provision of Parts

1 56/57.18002(a)(1). This term is also subjective  
2 and could result in varying interpretations and  
3 enforcement.

4 Seventh concern is individual liability.  
5 Records maintained in accordance with the  
6 workplace examination standard should not be used  
7 for the assessment of individual liability under  
8 Section 110 of the Mine Act against miners who  
9 perform examinations.

10 And finally, duplicate citations for exams  
11 and conditions. Operators are concerned that any  
12 new workplace examination standard, even with the  
13 proposed amendments, will more readily lead to  
14 MSHA inspectors issuing multiple citations for a  
15 single situation; one for the condition, and one  
16 for the examination. Operators respectfully  
17 request that MSHA ensure that additional  
18 enforcement not result from any revision to the  
19 workplace examination standard.

20 To conclude, we will submit formal comments  
21 before the November 13th deadline, and thank you  
22 again for the opportunity to testify this  
23 morning.

24 MS. MCCONNELL: Mr. Dolan, thank you for  
25 coming today, and thank you for your testimony.

1 Just a couple of things, housekeeping, if you  
2 could give a copy of your written remarks to the  
3 court reporter, that would be appreciated. We  
4 would like to also clarify one point regarding  
5 electronic databases. They are allowed under  
6 this -- they are allowed under the final rule.

7 I also would like to thank you for some of  
8 your recommendations in terms of improving the  
9 proposed rules, specifically on the provisions  
10 that we have proposed, and we will consider  
11 those. I don't have any -- I'm just going to  
12 reiterate something that I already stated in my  
13 testimony -- I mean, my opening statement, that  
14 the final rule published in January 2017 does not  
15 change any existing definitions in terms of  
16 competent person, working place, et cetera.

17 But other than that, I don't have any  
18 questions, but again, thank you for your  
19 recommendations, and we will consider those. I  
20 will turn to my colleagues, see if they have  
21 anything they would like to ask.

22 MR. STRICKLIN: I do, just a couple of  
23 informational questions I have. You said you  
24 have 500 employees. Just how many do you think  
25 are competent persons by definition of your 500.

1 MR. DOLAN: All of them.

2 MR. STRICKLIN: Every one of them. So they  
3 would make their own examination, they would have  
4 the ability to --

5 MR. DOLAN: They would have the ability.

6 MR. STRICKLIN: Okay. Is that like your  
7 company policy, whoever you hire is going to  
8 become a --

9 MR. DOLAN: For workplace examinations, we  
10 do task training workplace examinations as part  
11 of our task training process, and I am speaking  
12 for my company.

13 MR. STRICKLIN: Just one other question,  
14 you suggested that promptly would mean during the  
15 shift. So in a scenario, let's say the shift  
16 started at 8:00 in the morning, it was going to  
17 run until 4:00. By your suggestion, you're  
18 saying if you completed the corrective action by  
19 4:00 p.m., it wouldn't be documented in any book;  
20 correct?

21 MR. DOLAN: Correct, yes.

22 MS. MCCONNELL: I am going to follow-up on  
23 Kevin's, in terms of all of your miners are  
24 competent persons, right, and that would continue  
25 under the -- that's currently under this existing

1 rule, that's in the code and that would be the --  
2 that would be as it would be under the January  
3 2017 final rule.

4 Keeping with that idea, when -- how would  
5 this proposed rule add additional -- I mean, how  
6 does this proposed rule that we are now saying  
7 before work or as work begins affect or change  
8 what you're currently doing?

9 MR. DOLAN: Well, on the documentation end  
10 for items that would not be corrected during the  
11 shift.

12 MS. MCCONNELL: Right now, your miners, who  
13 are competent people, would enter into the  
14 workplace under the -- right now, they enter into  
15 the workplace, they conduct workplace  
16 examinations?

17 MR. DOLAN: At some point during the course  
18 of the shift.

19 MS. MCCONNELL: But it's not as they start  
20 work?

21 MR. DOLAN: Some may be towards the end of  
22 the shift.

23 MS. MCCONNELL: Some of your competent  
24 people conduct the workplace examination at the  
25 end of the shift?

1 MR. DOLAN: Yes.

2 MS. MCCONNELL: And do you do -- why do you  
3 do that? Is that to -- is that because like for  
4 the incoming shift?

5 MR. DOLAN: For the incoming shift or next  
6 day, we are prepared for the next day.

7 MS. MCCONNELL: Okay. I don't have  
8 anything else. Thank you, Mr. Dolan.

9 Our next speaker is Ms. Josie Gaskey.  
10 Ms. Gaskey, please state your name for the record  
11 and spell your name, as well as your  
12 organization. I don't think you have to spell  
13 out the organization.

14 MS. GASKEY: I handed her testimony.

15 MS. MCCONNELL: Great.

16 MS. GASKEY: Good morning. We want to  
17 thank you for the opportunity to present our  
18 comments, and we acknowledge and appreciate your  
19 efforts to work with the industry. My name is  
20 Josie Gaskey, and I am the director of  
21 environmental, safety and health for the  
22 Pennsylvania Aggregates and Concrete Association,  
23 PACA.

24 PACA represents broad interests of over 200  
25 member aggregates, cement and concrete companies,

1 and companies that support these industries,  
2 including equipment manufacturers, dealers,  
3 consultants and service providers in the  
4 Commonwealth of Pennsylvania. We have not taken  
5 a final position on this ruling yet.

6 The aggregate producers in Pennsylvania,  
7 many of whom are third, fourth and fifth  
8 generation families, are highly committed to  
9 workplace safety and health. Safety is our  
10 family business.

11 We are concerned about the workplace exam  
12 proposed rule, because we are unsure of the  
13 justification that the proposed rule will  
14 actually improve safety. MSHA's own data  
15 supports this statement. Attached to the back of  
16 my testimony, you will find an MSHA graph  
17 depicting fatality and all injury rates from the  
18 year 1977 through 2015.

19 In 2015, the metal and nonmetal mine  
20 industry injury rate reached an all-time low.  
21 Obviously, we feel we are doing something  
22 correctly, and we can see no need for any change.  
23 Furthermore, the initial workplace exam proposed  
24 rule wasn't based on any finding of unsafe work  
25 practices of the existing workplace exam

1 standard.

2           The current standard gives an operator the  
3 flexibility, as well as the responsibility, to  
4 establish exams that are effective for a  
5 particular workplace. We are concerned that  
6 under the proposed rule, the timing of exams does  
7 not allow the flexibility the operators need to  
8 conduct workplace exams as specific circumstances  
9 dictate. The proposed amendment indicates exams  
10 would be required before work begins, or as  
11 miners begin work in that place. In some of our  
12 facilities, there are only two supervisors on the  
13 first shift, and they need to examine maybe eight  
14 workplaces. On the second or third shift, there  
15 may be only one supervisor and eight workers.  
16 The proposed rule would require some operators to  
17 hire additional personnel. Operators need  
18 the flexibility to conduct workplace exams as  
19 circumstances dictate, with competent personnel  
20 that includes trained supervisors and workers.  
21 MSHA should consider hourly miners as competent  
22 persons, if they are listed in company training  
23 plans and have been provided the appropriate  
24 training in a list of various tasks.

25           We understand, and I heard what you

1 addressed with Mr. Dolan. Furthermore, we are  
2 unsure that the proposed rule complies with the  
3 letter and spirit of executive orders from both  
4 President Trump and former President Obama to  
5 consider regulatory approaches that reduce the  
6 burden of regulation, while maintaining  
7 flexibility and freedom of choice.

8 We are also concerned with the potential  
9 for enforcement personnel to issue multiple  
10 citations for a single situation; that is, one  
11 citation for the condition itself, and then one  
12 citation for the workplace exam. We request that  
13 MSHA ensure that no additional enforcement  
14 results from revisions -- that there are no  
15 additional enforcement results for revisions to  
16 the workplace exam rule.

17 We foresee challenges with the proposed  
18 rule due to potential vague terms and provisions  
19 and request clarifications of these. The term  
20 "working place", the existing standard  
21 differentiates between a working place and a  
22 travelway, and the proposed rule we feel should  
23 clearly differentiate between a working place and  
24 travelway. The term "conditions that may  
25 adversely affect safety and health", we are

1        requesting that you provide a clear definition  
2        for this term, because we believe this is the  
3        foundation of MSHA rules, as well as the proposed  
4        changes.

5                We also have concerns regarding enforcement  
6        interpretations of words, as you have heard from  
7        Eric, such as "promptly" and "initiate appropriate  
8        action". These terms, again, need to be defined  
9        with specific -- with sufficient specificity to  
10       provide clear, consistent guidance for both MSHA  
11       enforcement personnel and our operators.

12               We will be submitting written comments in  
13       coordination with NSSGA, and we support their  
14       comments. We look forward to working together  
15       with MSHA and other stakeholders in ironing out  
16       the details over the next several months.

17               Thank you.

18               MS. MCCONNELL: Thank you, Ms. Gaskey, and  
19       thank you for your testimony, and thank you for  
20       your participation in today's hearing. And I  
21       also want to reconfirm, you know, a conversation  
22       that you and I had, that yes, we will, as we --  
23       prior to the June 2018 date, we will be working  
24       with our stakeholders to ensure that guidance,  
25       information and training materials are provided

1 so that everyone has a clear understanding on the  
2 requirements of the final rule, and we will be  
3 reaching out to all stakeholders.

4 MS. GASKEY: On behalf of PACA, we truly  
5 appreciate that. Thank you.

6 MS. MCCONNELL: Did you guys have anything?

7 MR. STRICKLIN: I do not.

8 MR. MANTEL: I do not. Thank you.

9 MS. MCCONNELL: Mr. Julio Folhadella.  
10 Mr. Folhadella, would you please state your name  
11 and spell your name for our court reporter?

12 MR. FOLHADELLA: Okay. My name is Julio  
13 Folhadella, J-u-l-i-o, F-o-l-h-a-d-e-l-l-a. I  
14 work for Buzzi Unicem, it's a cement group in  
15 Lehigh Valley. We have about ten facilities in  
16 the United States, eight for cement production  
17 and two for fuel production. I have been working  
18 in the cement business for 25 years, and the cement  
19 business is a little bit different from a quarry.

20 We have a quarry, of course we mine  
21 limestone, our limestone is material for the cement  
22 business, and we have been discussing this change  
23 at the corporate level in our organization, and  
24 we have some doubts.

25 First of all, and for me today, it's a

1 little bit more clear, but we have doubts about  
2 who is the competent person to do the  
3 inspections. Because at the beginning, we were  
4 talking about the supervision, management, and we  
5 put out ideas saying it could be the supervisor or  
6 a competent person. That's not division that the  
7 union has about the proposal. The union  
8 understands that the proposal is just for  
9 management, and only management is in charge of  
10 those inspections.

11 If we don't clarify that a competent person  
12 could be a miner, this rule is going to be  
13 impossible to implement in any cement plant in  
14 the United States, not only in my organization.  
15 We have a maintenance department, just as an  
16 example. I have 30 miners working in the  
17 maintenance department, and I have three  
18 supervisors, more or less ten miners per  
19 supervisor. We have a maintenance assistant that  
20 prints all the work orders and all the services  
21 that the department has to work on that day.  
22 Every day in the morning, we have a safety daily  
23 talk. It's mandatory, the supervisor talks with  
24 all his crew about safety.

25 Based on the services, the supervisor gives

1 an orientation regarding safety for all of the  
2 employees, and they send the guys basically to do  
3 the job in the fields. And it's going to be  
4 impossible, first of all, to predict to the day  
5 before what kind of change we have in our  
6 schedule for maintenance to do the inspections in  
7 advance, and also, at that moment, it's going to  
8 be impossible for the supervisor to send his crew  
9 to work in the field and being there before they  
10 start work.

11 So if we don't qualify the miners to be  
12 this competent person and they have to do the  
13 inspection when they get at the point, it's not  
14 going to be -- we are not going to be able to  
15 permit this rule.

16 MS. MCCONNELL: Mr. Folhadella, I want to  
17 give you an opportunity to finish your testimony,  
18 but I just feel like I need to interject now. Is  
19 that okay? Just to clarify, this proposed rule,  
20 nor does the January 2017 rule, change the  
21 definition of competent person. If your miners  
22 are competent people and are conducting their own  
23 workplace examinations, that would continue under  
24 the January 2017 rule.

25 We are not requiring that the competent

1 person be a manager or a supervisor or a foreman.  
2 So whatever you are currently doing in terms of  
3 identifying competent people, conducting  
4 workplace examinations, that would continue.

5 MR. FOLHADELLA: Thank you, very much.

6 MS. MCCONNELL: More than welcome. That  
7 was it?

8 MR. FOLHADELLA: That's it. I think that's  
9 it, if we can qualify --

10 MS. MCCONNELL: And I think I hear that --  
11 no, I know we hear that need to clarify that we  
12 are not changing the --

13 MR. FOLHADELLA: Not management. A miner  
14 can be qualified as a competent person?

15 MS. MCCONNELL: If your miners are  
16 currently competent people, they continue to be  
17 competent people.

18 MR. FOLHADELLA: Okay. They are. That's  
19 good for me. Thank you. Thank you for your time  
20 and your patience.

21 MS. MCCONNELL: Thank you for coming. Is  
22 there anyone else that would like to speak? That  
23 was our last request.

24 Please state your name, spell your name and  
25 your organization.

1           MR. MIRANDA: Good morning, my name is  
2 Ernest Miranda, E-r-n-e-s-t, M-i-r-a-n-d-a, and I  
3 am with Golder Associates. The comment I would  
4 like to make is actually more of a request. Over  
5 the past year, I have had the opportunity to  
6 train and educate our work force with Golder  
7 Associates on the upcoming change, and it's been  
8 great because it's given me some feedback that I  
9 think needs to be included in today's hearing so  
10 that it be given consideration for potential  
11 training on the training material for inspectors  
12 and such.

13           But this clarification needed, one of the  
14 questions came up was that we as consultants,  
15 contractors, we are often on a mine site for a  
16 limited basis. We may show up for a couple of  
17 days, provide guidance and work hand-in-hand with  
18 our client, and then leave. And the question  
19 that was presented to me was that if we are on a  
20 mine site and we, in our work area, note a hazard  
21 that is the client's responsibility, not ours,  
22 say for example there was missing guarding on a  
23 conveyer system and we notated on our workplace  
24 examination form, is the expectation then that we  
25 maintain that record for the period of one year?

1           And I know in the previous proposed change,  
2           the date when the work was completed needed to be  
3           notated, and they said if we have left and that  
4           condition has not been corrected, how do we go  
5           about maintaining -- properly maintaining that  
6           record according to the proposed regulation? And  
7           my initial thought was, and the feedback I  
8           provided was that we identify on the record whom  
9           of our client representative we informed of the  
10          adverse condition, and the date and time that we  
11          did so, which would essentially close that out  
12          for us since we don't have the -- bear the  
13          responsibility of correcting or repairing.

14          And subsequently, I have had opportunity to  
15          talk with several MSHA individuals through  
16          conferences and such, and there seemed to be kind  
17          of, well, I don't know, that sounds right, but we  
18          are not quite sure. And so I am seeking that  
19          there be some kind of clarification on the  
20          expectation on the behalf of contractors and  
21          consultants on their responsibilities, because it  
22          is vague, and it's important that we are in  
23          compliance, because the mining industry is the  
24          basis for our work, and we want to make sure that  
25          we are doing the right thing.

1           We have certainly instructed our employees  
2           that if there is that hazard, to immediately  
3           withdraw until that issue is corrected or if they  
4           deem that it is safe. So we have addressed that  
5           part, but as far as the record keeping issue,  
6           there is that concern on how we can make sure  
7           that we are in compliance.

8           MS. MCCONNELL: Do you mind if I just -- I  
9           just need a little bit more background. I think  
10          this is the first time I have heard this  
11          scenario, that a contractor does a workplace  
12          examination for an operator. Could you give me a  
13          little bit of background in terms of what your  
14          company would do for an operator in terms of  
15          maintaining -- creating the record, maintaining  
16          the record?

17          MR. MIRANDA: Certainly. We don't -- for  
18          clarification, we do not do the workplace  
19          examination on behalf of the operator, but we  
20          will be on an operator's property, and because  
21          our people are deemed competent, they are left to  
22          be -- allowed to be left alone to conduct their  
23          work. So it is our expectation and our  
24          requirement within Golder that every person do a  
25          workplace examination.

1 MS. MCCONNELL: I see. So now I  
2 understand. You have staff that are performing  
3 work tasks at --

4 MR. MIRANDA: Yes, that is correct.

5 MS. MCCONNELL: And they are doing their  
6 workplace examination?

7 MR. MIRANDA: Exactly. And there is times  
8 where we are working adjacent to a facility or a  
9 piece of equipment that we may note a hazard, and  
10 we -- our people are good on notating that, but  
11 they are saying how long do we keep that record  
12 open? Is it a requirement that we maintain  
13 contact with the client to make sure that they  
14 corrected it, and that was -- that popped in my  
15 response is that our requirement should be that  
16 we notify the client of the hazard and note who  
17 was contacted and the date and time it was done,  
18 because we have no control over how they choose  
19 to correct it.

20 MS. MCCONNELL: Okay. I would appreciate  
21 if you provided some written comments to the  
22 record for our consideration in terms of adding  
23 that clarifying language, that would be helpful.

24 Kevin, did you have anything?

25 MR. STRICKLIN: Well, I guess I have got an

1 opinion about that, and I guess it's -- Ernest,  
2 it would be the mine operator's responsibility to  
3 maintain that record, and also get the condition  
4 corrected. Because in my scenario, you may be  
5 there today, but tomorrow, there may be someone  
6 else there, and someone has to have the holistic  
7 safety and health of the mine under their  
8 jurisdiction, and that would be the mine  
9 operator.

10 I think what you're doing is correct, give  
11 them a copy of it. If it was me and I was a  
12 contractor, I would keep a copy of everything I  
13 gave him, naturally, but it would be the mine  
14 operator's responsibility to carry it in a book  
15 and make sure that it's corrected before anybody  
16 else works in that area.

17 Naturally, I think you know that if you  
18 find a hazard and -- while your contracting  
19 group may not be able to correct it, you still  
20 need to get away from that hazard.

21 MR. MIRANDA: Yes, and thank you for that,  
22 I am in total agreement, and that's the approach  
23 we have been taking. In fact, my instruction was  
24 that if a client requires that we use their  
25 workplace examination form rather than ours, or

1 we do hand over a form to identify to them a  
2 hazard, that we maintain a copy either through a  
3 photograph of the form prior to handing it out,  
4 because a lot of times we are out in the middle  
5 of the field, out in the drill site, whatever,  
6 and we don't have access to a copier, but I said  
7 take a picture of it for documentation and  
8 maintain that.

9 MR. STRICKLIN: We see everything from 500  
10 miners without any contractors on the property,  
11 to one mine operator and 150 contractors. But  
12 it's always the mine operator's responsibility to  
13 correct the condition.

14 MR. MIRANDA: That would be correct. That  
15 is all.

16 Thank you, very much.

17 MS. MCCONNELL: Thank you. Anyone else  
18 like to speak? I think what we are going to do  
19 is I am going to move up my -- I am not going to  
20 close the hearing, because I am going to take a  
21 break, just to make sure if anyone else wanted to  
22 come and talk, so that if you all would like to  
23 go, I would like to just make a few concluding  
24 remarks prior to concluding the hearing, if that  
25 makes sense.

1           One of the things I would like to mention  
2           is the fact that MSHA -- I would like to mention  
3           MSHA's efforts to respond to Executive Order  
4           13777, which is enforcing the Regulatory Reform  
5           Agenda, and that Executive Order directs each  
6           Federal agency to evaluate existing regulations  
7           and make recommendations regarding their repeal,  
8           replacement or modification consistent with law.

9           To comply with this Executive Order, we are  
10          seeking stakeholders' assistance to help us  
11          identify and evaluate existing regulations that  
12          could potentially be removed, revised or  
13          streamlined, while not reducing protections for  
14          miners. MSHA considers early public  
15          participation in the regulatory reform process to  
16          be particularly important for the mining  
17          community to present their views and  
18          recommendations, information, data, et cetera,  
19          including economic and technological feasibility.

20          We have -- we make -- we generally make  
21          this request at all stakeholder meetings,  
22          conferences, and we are doing so here today, and  
23          to help facilitate this conversation initially,  
24          we have placed an e-mail address on our main web  
25          page. It's under the Spotlight section of

1 msha.gov. I would read out the e-mail address,  
2 but it's like with any e-mail address, it's way  
3 too long, and it would be not very meaningful.  
4 So I would suggest go to msha.gov, main home page  
5 under Spotlight, and you'll see a link to an  
6 e-mail address to send any kind of  
7 recommendation. This is initial conversation,  
8 this does not preclude any more formal discussions  
9 that we will have with our stakeholder community  
10 in the form of a Federal Register notice,  
11 requests for information, this is just something  
12 to start the conversation.

13 We will be having stakeholder meetings to  
14 further have that dialogue on addressing  
15 Executive Order 13777. We were hoping that if we  
16 had this initial conversation on some ideas, it  
17 will give us a good starting place when we do  
18 have those meetings.

19 And I would also like to verify, too, that  
20 we published the final rule that extended the  
21 effective date of the January 2017 to June 2018,  
22 and we will be having -- working with  
23 stakeholders to develop materials, FAQs, and we  
24 will be holding stakeholder meetings on that  
25 issue, as well. This is MSHA's traditional way

1 of rolling out a final rule, and that will be our  
2 way for this one, as well. We will be reaching  
3 out to the stakeholder community as we develop  
4 these FAQs and materials and working with all  
5 stakeholders in their development.

6 With that, I am going to take a break and  
7 see if anyone wanders in or if there is any other  
8 comments that you all would like to make. It's  
9 9:47, I am thinking 10:30, and if anyone wants to  
10 say anything else, we will reconvene.

11 (Recess taken.)

12 MS. MCCONNELL: So it's 10:30, and so we  
13 are going to re-open the hearing. And I see that  
14 there are -- well, I ask, is there anyone else  
15 who would like to make any additional remarks?

16 So since there is no one else, at this  
17 time, I would like to thank everyone who  
18 participated in this public hearing, and our  
19 hearing is now concluded.

20 - - -

21 (Whereupon, at 10:30 a.m., the  
22 public hearing was adjourned.)

23 - - -

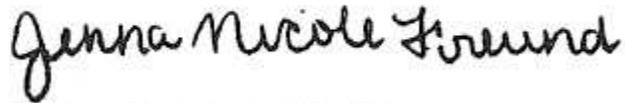
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C-E-R-T-I-F-I-C-A-T-E

I, Jenna Nicole Freund, the undersigned, do hereby certify that the foregoing thirty-eight (38) pages are a true and correct transcript of my stenotypy notes taken of the Public Hearings on Examinations of Working Places in Metal and Nonmetal Mines, Proposed Rule, held at the Wyndham Pittsburgh University Center, Schenley Ballroom, 100 Lytton Avenue, Pittsburgh, Pennsylvania 15213, on Thursday, November 1, 2017.



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Jenna Nicole Freund, Court Reporter

**OPENING STATEMENT**

**PUBLIC HEARING ON EXAMINATIONS OF WORKING PLACES IN METAL  
AND NONMETAL MINES**

Good morning. My name is Sheila McConnell, and I am the Director of the Office of Standards, Regulations, and Variances for the Mine Safety and Health Administration. I am the moderator for this public hearing on MSHA's proposed rule on examinations of working places in metal and nonmetal mines which was published in the Federal Register on September 12, 2017. On behalf of Acting Assistant Secretary for Mine Safety and Health, Wayne Palmer, I want to welcome all of you here today and thank you for your attendance and participation.

The purpose of this hearing is to receive information from the public that will help MSHA evaluate the proposed rule that would make limited changes to the Agency's January 2017 final rule on examinations of working places in metal and nonmetal mines.

This is the last of four public hearings. The first hearing was held on Tuesday, October 24<sup>th</sup> at MSHA Headquarters in Arlington, VA; the second on Thursday, October 26<sup>th</sup> in Salt Lake City; and the third on Tuesday, October 31<sup>st</sup> in Birmingham, AL.

I'd like to introduce the members of our panel. We ~~have Samuel Pierce, the Southeast District Manager for Metal and Nonmetal Mine Safety and Health;~~ Kevin Stricklin, Acting Administrator for Metal and Nonmetal Mine Safety and Health; and Brad Mantel from the Office of the Solicitor.

These hearings are conducted in an informal manner. Formal rules of evidence do not apply. The hearing panel may ask questions of speakers, and speakers may ask questions of the panel. Speakers and other attendees may present information to the court reporter for the rulemaking record. MSHA will accept comments and other information for the record from any interested party, including those not presenting oral statements. We ask everyone in attendance

to sign the attendance sheet.

As background, on January 23, 2017, MSHA published a final rule on examinations of working places in metal and nonmetal mines. The effective date of the final rule was stayed until June 2, 2018. This January 2017 final rule, which strengthens and improves MSHA's existing requirements for MNM examinations of working places, requires a mine operator to:

- 1) Have a competent person examine each working place at least once each shift before miners begin work in that place;
- 2) Promptly notify miners in affected areas of any conditions that may adversely affect their safety or health;
- 3) Promptly initiate action to correct the adverse conditions;
- 4) Withdraw all persons from affected areas when alerted to any conditions that may present an imminent danger, until the danger is abated;
- 5) Create an examination record before the end of each shift that includes the name of the person conducting the examination, date of the examination, location of all areas examined, and description of each condition found that may adversely affect the safety or health of miners. The record

must also include, or be supplemented to include, the dates of corrective actions taken;

- 6) Maintain examination records for at least one year, make such records available for inspection by MSHA and miners' representatives, and provide copies upon request.

The January 2017 rule retains several existing concepts, definitions, and responsibilities, such as the definitions of "competent person" and "working place"; the conditions that may present an imminent danger; and the retention and availability of examination records.

For example, the term "competent person" continues to be defined as "a person having abilities and experience that fully qualify him to perform the duty to which he is assigned."

A "working place" continues to be defined as "any place in or about a mine where work is being performed."

On September 12, 2017, MSHA published a proposed rule that would make limited changes to the January 2017 final rule. The limited changes being considered would require that:

- 1) Examination of a working place must be conducted before work begins, or as miners begin work in that place. The January 2017 final rule requires the examination be made before miners begin work in the working place

The proposed change would provide operators additional flexibility in scheduling the working place examinations by allowing miners to enter a working place at the same time that the competent person conducts the examination. However, as noted in the preamble to the proposed rule, MSHA intends that the examination be conducted in a time frame sufficient to assure that any adverse conditions be identified and corrected before miners are exposed.

Like the January 2017 final rule, the proposed rule would continue to permit mine operators with consecutive shifts, or those that operate on a 24-hour,

365-day basis, to conduct the examination for the next shift at the end of the previous shift. As stated in the January 2017 final rule, however, because conditions at mines can change, MSHA expects that operators will conduct examinations at a time sufficiently close to the start of the next shift to minimize miners' potential exposure to conditions that may adversely affect their safety or health. And;

- 2) The examination record must include descriptions of adverse conditions that are not corrected promptly, and the dates of corrective action for these conditions.

The January 2017 final rule requires that *each* adverse condition be documented in the examination record. The proposed rule, however, would reduce the mine operator's recordkeeping burden by requiring that the examination record include a description only of each adverse condition

*that is not corrected promptly.* A similar conforming change would require that the examination record include the dates of corrective action for only those adverse conditions that are not corrected promptly. Therefore, under the proposed rule, when adverse conditions are corrected promptly, there would be no requirement that the examination record include descriptions either of those corrected adverse conditions or of corrective action dates for those conditions. MSHA interprets the term “promptly” to mean before miners are potentially exposed to adverse conditions.

The proposed rule would not change any other information to be included in the examination record as specified in the January 2017 final rule.

We are requesting comments and information from the mining community only on these limited changes in the proposed rule, that is -- the timing of the working place examination and documenting adverse conditions and corrective action dates in

the examination record -- and how these proposed changes may affect the safety and health of miners.

We also request comments on all cost and benefit estimates presented in the preamble to the proposed rule and on the data and assumptions the Agency used to develop these estimates. This includes the Agency's assumptions on the number of instances adverse conditions are promptly corrected and time saved by not requiring these corrected conditions to be included in the record.

As you address the proposed limited changes, either in your testimony today or in your written comments, please be specific. Specific information and supporting rationale helps MSHA produce a final rule that is responsive to the needs and concerns of the stakeholder community.

MSHA will make available a verbatim transcript of this public hearing approximately two weeks from the completion of the hearing. You may view the transcripts of all public hearings and

comments on our website at [msha.gov](http://msha.gov) and on [regulations.gov](http://regulations.gov).

If you have a copy of your testimony, please give a copy and any submissions to the court reporter so that they can be appended to the hearing transcript. Following this public hearing, you may also submit additional comments using one of the methods identified in the Addresses section of the proposed rule. All comments must be received by Monday, November 13<sup>th</sup>, 2017.

Again, if you haven't signed in on the attendance sheet, please do so.

Please also be advised that on October 5, 2017, MSHA published a final rule to stay the effective date of the January 2017 Examinations final rule to June 2, 2018. This delay will allow MSHA additional time and flexibility to provide compliance assistance to industry, and training to stakeholders and MSHA inspectors on the final rule

requirements. Meanwhile, MSHA will continue to enforce the rule you've all been working under so far.

So with that, I would like to introduce our first speaker, \_\_\_\_\_ . Good morning, \_\_\_\_\_ . Please state and spell your name for the Court Reporter.

\* \* \* \* \*

[Statement for close of hearing]

Is there anyone else who wishes to make a presentation? I thank everyone for coming forward and making a presentation. I also thank everyone else who attended the hearing. I want to emphasize that we need your comments by Monday, November 13<sup>th</sup>. We will take all your comments and concerns into consideration when we develop the final rule. I continue to encourage you to participate and provide your input during this rulemaking process.

Before this hearing concludes, I would also like to mention MSHA's upcoming regulatory reform initiative. E.O. 13777,

Enforcing the Regulatory Reform Agenda, directs each federal agency to evaluate existing regulations and make recommendations regarding their repeal, replacement, or modification, consistent with applicable law.

To comply with this Executive Order, we will seek stakeholder input to assist MSHA in identifying and evaluating existing regulations that could potentially be removed, revised, or streamlined, while not reducing protections for miners. MSHA considers early public participation in the regulatory reform process to be particularly important for the mining community to present their views and recommendations, information, and data, including economic and technological feasibility concerns. Therefore, under the heading SPOTLIGHT on MSHA's main web page, we have included a link to an email address where stakeholders can submit their comments on reform of MSHA's regulations.

Pittsburgh 11-2-2017

That address is: [zzMSHA-OSRVRRegulatoryReform@dol.gov](mailto:zzMSHA-OSRVRRegulatoryReform@dol.gov).

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Also, MSHA will hold stakeholder meetings in various locations around the country to hear your ideas. MSHA will publish a Federal Register notice announcing the dates and locations of the stakeholder meetings. Information that the mining community provides will help improve the health and safety of miners and assist MSHA in determining the appropriate regulatory action.

At this time, I want to thank you very much. Our Public Hearing is concluded.

## Bullet Points for Comments on Workplace Exam Proposed Amendments

### Introduction

Good morning. Thank you for the opportunity to testify today. My name is Eric Dolan. I serve as Vice President of Corporate Safety for New Enterprise Stone & Lime Co., Inc. In this role, I oversee the safety and health interests of over 500 miners employed at over 35 active mine sites located within Pennsylvania and Western New York. My corporation is also a long-standing member of the National Stone, Sand & Gravel Association, or NSSGA, who represents an estimated 100,000 miners from about 150 companies. I have <sup>also</sup> individually served on NSSGA's Occupational Safety & Health Committee ~~for over two years~~. I will be delivering key points on behalf of the NSSGA during my testimony this morning.

While we are concerned about any need for a rule, we acknowledge the effort put in by the new Administration. There is some relief in the revised workplace exams rule proposal from the earlier proposal, and believe this is a step in the right direction.

Additionally, we have not yet taken a final position on the rule. However, we are concerned with several provisions or aspects, on which I will briefly touch this morning.

Our industry has long been committed to workplace safety and health. This has been a guiding principle of our national association, NSSGA, for the past two and-a-half decades.

And, this commitment is exemplified in the degree to which we've reduced injuries in stone, sand and gravel. For example, the operators within our industry have reduced the injury rate year-over-year for the past 16 consecutive years. The injury rate for stone, sand and gravel now stands at the record low level of just 1.95 injuries per 200,000 hours worked.

While there are some interesting ideas in the September proposal, we remain concerned about significant new enforcement liability at a time in which our industry sector's performance has achieved record levels of injury reductions under the current standard. Accordingly, we are far from convinced that a new rule for workplace exams is needed or justified.

I will now provide an overview of eight key concerns regarding the proposed rule.

### Overview of key concerns

1. The Timing of Examinations: The initial version of the Final Rule required that workplace examinations be conducted “before miners begin work in that place.” MSHA has proposed to amend the Final Rule such that examinations would be required “before work begins or as miners begin work in that place.” The Proposed Amendment does not provide adequate relief for the following reasons:
  - It continues to unnecessarily constrain when operators can conduct their workplace examinations.
  - Operators need flexibility to conduct workplace examinations as circumstances dictate. Shifts are not typically uniform at all operations. Circumstances can change during a given shift. The existing Workplace Examination standard provides the necessary flexibility.
  - The phrase “that place” in the Proposed Amendment is unclear and could lead to confusion at the mine site. It raises uncertainty as to where specifically one should examine to cover work that is to be done by an oncoming shift.
  - ○ The Final Rule with Proposed Amendment leaves too much uncertainty for enforcement.
2. Documentation: MSHA has proposed to reduce the documentation requirement of the Final Rule such that conditions that are found and promptly corrected would no longer need to be recorded, nor would their corrections. MSHA has advised that, for purposes of this provision, “promptly” means “before miners are potentially exposed to adverse conditions.”
  - We do believe the proposed Amendment is an improvement over the Final Rule because a number of conditions typically found during a workplace examination are able to be corrected during the examination.
  - I would like to offer an idea for the agency’s consideration: If any new Workplace Examination standard is to take effect, MSHA should consider further revising the documentation requirement such that conditions that are corrected during the shift on which they are found should not be required to

be recorded. This would further the intent of the amendment of only requiring recording of conditions that are unable to be corrected in a timely basis.

- ○ Operators are also concerned that the increased documentation requirement will lead to additional enforcement based solely on the examination records.
- If any new Workplace Examination standard is to take effect, operators should be afforded maximum flexibility in the recording of conditions and corrections, including use of **work orders** and **existing electronic databases** for documentation.

### 3. Costs

- ○ MSHA's accounting for costs of the Final Rule, even with the Proposed Amendments, does not appear to consider real-world consequences of the new regulation.
- It is expected that some operators will need to hire additional employees to manage the requirements of any new Workplace Examination standard.

4. Notification: The Final Rule with the Proposed Amendments continues to fail to define what constitutes notification of adverse conditions to affected miners.

5. Lack of Benefits: The initial Workplace Examination Final Rule was not predicated on any finding of unsafe work practices with the existing workplace examination standard. It also could not identify any benefit to a new Workplace Examination Standard, especially from a quality improvement perspective. The Proposed Amendments do nothing to remedy these issues and there is additional concern that the initial final rule and proposed amendments could potentially have an adverse effect on the quality of workplace examinations.

6. Vague and Unclear Terms and Provisions: The initial Workplace Examination Final Rule contained many vague and unclear terms and provisions. The Proposed Amendments do not offer any clarification of these terms. Vague and unclear terms include:

- The term "working place" for purposes of Parts 56/57.18002(a). It remains troublesome that MSHA appears to consider areas commonly thought of as travel-ways as "working places" when the existing standard already differentiates between a "working place" and a "travel-way within 30 C.F.R. §§ 56/57.2.

- The term “conditions that may adversely affect safety and health” for purposes of Parts 56/57.18002(a)(1). During the comment period preceding promulgation of the Final Rule, commenters raised that this term was potentially ambiguous, yet MSHA did not provide definitional guidance for this term. This is <sup>especially</sup> particularly problematic because examining for “conditions that may adversely affect safety and health” is the touchstone of the entire rule, including the changes contemplated by the Proposed Amendments.
  - The term “promptly” for purposes of the notification requirement and remediation requirement of Parts 56/57.18002(a)(1). This term is very subjective and could result in varying interpretations in enforcement. Additionally, although the Proposed Amendments provide some guidance as to the term “promptly” with respect to when conditions need not be recorded, that guidance remains subject to interpretation and requires greater clarification.
  - The term “initiate appropriate action” for the remediation provision of Parts 56/57.18002(a)(1). This term is also subjective and could result in varying interpretations in enforcement.
- 7. Individual Liability: Records maintained in accordance with the Workplace Examination standard should not be used for the assessment of individual liability under Section 110 of the Mine Act against miners performing examinations.
8. Duplicate Citations for Exams and Conditions: Operators are concerned that any new Workplace Examination standard, even with the Proposed Amendments, will more readily lead to MSHA inspectors issuing multiple citations for a single situation: one for the condition and one for the examination. Operators respectfully request that MSHA ensure that such additional enforcement not result from any revision to the Workplace Examination standard.

## Conclusion

To conclude, we will submit formal comments before the November 13 deadline. Thank you again for this opportunity to testify this morning.

## Mine Safety and Health Administration

### Public Hearings on Examinations of Working Places in Metal and Nonmetal Mines

October 24, 26, and 31, 2017; November 2, 2017

#### Abbreviations and Commonly Used Terms

30 CFR

Section 57.18002

Section 58.18002

Adverse conditions

Conditions that may adversely affect safety or health

Corrective action

Deregulatory

DOL (Department of Labor)

Executive Order

Feasible *or* feasibility

Federal Register

MSHA (Mine Safety and Health Administration)

Metal And Nonmetal (MNM)

NIOSH (National Institute for Occupational Safety and Health)

OSHA (Occupational Safety and Health Administration)

Working place (may also say "workplace")

necessary to avoid an imminent hazard to the public safety. As provided in this subsection, the Attorney General may, by order, schedule a substance in Schedule I on a temporary basis. Such an order may not be issued before the expiration of 30 days from (1) the publication of a notice in the **Federal Register** of the intention to issue such order and the grounds upon which such order is to be issued, and (2) the date that notice of the proposed temporary scheduling order is transmitted to the Assistant Secretary of HHS. 21 U.S.C. 811(h)(1).

Inasmuch as section 201(h) of the CSA directs that temporary scheduling actions be issued by order and sets forth the procedures by which such orders are to be issued, the DEA believes that the notice and comment requirements of section 553 of the Administrative Procedure Act (APA), 5 U.S.C. 553, do not apply to this notice of intent. In the alternative, even assuming that this notice of intent might be subject to section 553 of the APA, the Administrator finds that there is good cause to forgo the notice and comment requirements of section 553, as any further delays in the process for issuance of temporary scheduling orders would be impracticable and contrary to the public interest in view of the manifest urgency to avoid an imminent hazard to the public safety.

Although the DEA believes this notice of intent to issue a temporary scheduling order is not subject to the notice and comment requirements of section 553 of the APA, the DEA notes that in accordance with 21 U.S.C. 811(h)(4), the Administrator took into consideration comments submitted by the Assistant Secretary in response to notice that DEA transmitted to the Assistant Secretary pursuant to section 811(h)(4).

Further, the DEA believes that this notice of intent is not a "rule" as defined by 5 U.S.C. 601(2), and, accordingly, is not subject to the requirements of the Regulatory Flexibility Act (RFA). The requirements for the preparation of an initial regulatory flexibility analysis in 5 U.S.C. 603(a) are not applicable where, as here, the DEA is not required by section 553 of the APA or any other law to publish a general notice of proposed rulemaking.

Additionally, this action is not a significant regulatory action as defined by Executive Order 12866 (Regulatory Planning and Review), section 3(f), and, accordingly, this action has not been reviewed by the Office of Management and Budget.

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 (Federalism) it is determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**List of Subjects in 21 CFR Part 1308**

Administrative practice and procedure, Drug traffic control, Reporting and recordkeeping requirements.

For the reasons set out above, the DEA hereby provides notice of its intent to temporarily amend 21 CFR part 1308 as follows:

**PART 1308—SCHEDULES OF CONTROLLED SUBSTANCES**

■ 1. The authority citation for part 1308 continues to read as follows:

**Authority:** 21 U.S.C. 811, 812, 871(b), unless otherwise noted.

■ 2. In § 1308.11, add paragraphs (h)(19) through (21) to read as follows:

**§ 1308.11 Schedule I.**

\* \* \* \* \*

(h) \* \* \*

(19) *N*-(2-fluorophenyl)-*N*-(1-phenethylpiperidin-4-yl)propionamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other names: *ortho*-fluorofentanyl, 2-fluorofentanyl)—(9816)

(20) *N*-(1-phenethylpiperidin-4-yl)-*N*-phenyltetrahydrofuran-2-carboxamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: tetrahydrofuran-yl fentanyl)—(9843)

(21) 2-methoxy-*N*-(1-phenethylpiperidin-4-yl)-*N*-phenylacetamide, its isomers, esters, ethers, salts and salts of isomers, esters and ethers (Other name: methoxyacetyl fentanyl)—(9825)

Dated: August 26, 2017.

**Chuck Rosenberg,**

*Acting Administrator.*

[FR Doc. 2017-19283 Filed 9-11-17; 8:45 am]

**BILLING CODE 4410-09-P**

**DEPARTMENT OF LABOR**

**Mine Safety and Health Administration**

**30 CFR Parts 56 and 57**

[Docket No. MSHA-2014-0030]

RIN 1219-AB87

**Examinations of Working Places in Metal and Nonmetal Mines**

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Proposed rule, limited reopening of the rulemaking record; notice of public hearings; close of comment period.

**SUMMARY:** The Mine Safety and Health Administration (MSHA) proposes to amend the Agency's final rule on examinations of working places in metal and nonmetal mines that was published in January 2017. The proposed changes would require that an examination of the working place be conducted before work begins or as miners begin work in that place, and that the examination record include descriptions of adverse conditions that are not corrected promptly and the dates of corrective action for these conditions. The proposed rule would provide mine operators additional flexibility in managing their safety and health programs and reduce regulatory burdens without reducing the protections afforded miners.

**DATES:** MSHA is reopening the comment period to solicit comments on limited changes to the final rule published on January 23, 2017 (82 FR 7695), effective May 23, 2017, and delayed on May 22, 2017 (82 FR 23139), until October 2, 2017 (82 FR 23139).

*Comment date:* Comments must be received or postmarked by midnight Eastern Standard Time (EST) on November 13, 2017.

*Hearing dates:* October 24, 2017, October 26, 2017, October 31, 2017, and November 2, 2017. The locations are listed in the Public Hearings section in the **SUPPLEMENTARY INFORMATION** section of this document.

**ADDRESSES:** Submit comments and informational materials, identified by RIN 1219-AB87 or Docket No. MSHA-2014-0030, by one of the following methods:

- *Federal E-Rulemaking Portal:* <https://www.regulations.gov>. Follow the online instructions for submitting comments.
- *Email:* [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov).
- *Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th

Street South, Suite 4E401, Arlington, Virginia 22202-5452.

- **Hand Delivery or Courier:** 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th floor East, Suite 4E401.

- **Fax:** 202-693-9441.

**Information Collection Requirements:** Comments concerning the information collection requirements of this proposed rule must be clearly identified with RIN 1219-AB87 or Docket No. MSHA-2014-0030, and sent to both MSHA and the Office of Management and Budget (OMB). Comments to MSHA may be sent by one of the methods in the ADDRESSES section above. Comments to OMB may be sent by mail addressed to the Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, 725 17th Street NW., Washington, DC 20503, Attn: Desk Officer for MSHA, or

via email [oir\\_submissions@omb.eop.gov](mailto:oir_submissions@omb.eop.gov).

**Instructions:** All submissions must include RIN 1219-AB87 or Docket No. MSHA-2014-0030. Do not include personal information that you do not want publicly disclosed; MSHA will post all comments without change, including any personal information provided.

**Docket:** For access to the docket to read comments received, go to <https://www.regulations.gov> or <https://www.msha.gov/currentcomments.asp>. To read background documents, go to <https://www.regulations.gov>. Review the docket in person at MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Arlington, Virginia, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th floor East, Suite 4E401.

**Email Notification:** To subscribe to receive email notification when MSHA

publishes rulemaking documents in the **Federal Register**, go to <https://www.msha.gov/subscriptions>.

**FOR FURTHER INFORMATION CONTACT:** Sheila A. McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at [mcconnell.sheila.a@dol.gov](mailto:mcconnell.sheila.a@dol.gov) (email), 202-693-9440 (voice), or 202-693-9441 (fax). These are not toll-free numbers.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

*A. Public Hearings*

MSHA will hold four public hearings on the proposed rule to provide the public with an opportunity to present oral statements, written comments, and other information on this rulemaking. The public hearings will begin at 9 a.m. and end after the last presenter speaks, and in any event not later than 5 p.m., on the following dates at the locations indicated:

Date/time	Location	Contact No.
October 24, 2017, 9 a.m. ....	Mine Safety and Health Administration Headquarters, 201 12th Street South, 7 West Conference Rooms, Arlington, VA.	(202) 693-9440
October 26, 2017, 9 a.m. ....	75 South West Temple, Salt Lake City, UT 84101 .....	(801) 531-0800
October 31, 2017, 9 a.m. ....	Sheraton Birmingham Hotel, 2101 Richard Arrington Jr. Boulevard North, Birmingham, AL 35203.	(205) 324-5000
November 2, 2017, 9 a.m. ....	Wyndham Pittsburgh University Center, 100 Lytton Ave., Pittsburgh, PA 15213 .....	(412) 682-6200

The hearings will begin with an opening statement from MSHA, followed by an opportunity for members of the public to make oral presentations. Speakers and other attendees may present information to MSHA for inclusion in the rulemaking record. The hearings will be conducted in an informal manner. Formal rules of evidence or cross examination will not apply.

A verbatim transcript of the proceedings will be prepared and made a part of the rulemaking record. Copies of the transcript will be available to the public. The transcript may also be viewed on MSHA's Web site at <https://arlweb.msha.gov/currentcomments.asp>, under Comments on Public Rule Making.

**B. Regulatory History**

On January 23, 2017, MSHA published a final rule, Examinations of Working Places in Metal and Nonmetal Mines ("2017 rule") in the **Federal Register** (FR) amending the Agency's standards for the examination of working places in metal and nonmetal mines. 82 FR 7680. The 2017 rule was scheduled to become effective on May 23, 2017. On March 27, 2017, MSHA published a proposed rule to delay the

effective date of the 2017 rule to July 24, 2017. 82 FR 15173. On May 22, 2017, MSHA published a final rule delaying the effective date of the 2017 rule until October 2, 2017. 82 FR 23139. Elsewhere in this issue of the **Federal Register**, MSHA is publishing a document taking comments on delaying the effective date of the final rule.

**II. Discussion of Issues**

*A. Introduction*

Effective working place examinations are a fundamental accident prevention tool used by operators of metal and nonmetal (MNM) mines; they allow operators to find and fix adverse conditions and violations of health and safety standards before they cause injury or death to miners.

After further review of the rulemaking record, MSHA is considering limited changes to the 2017 rule to address: (1) When working place examinations must begin, and (2) the adverse conditions and related corrective actions that must be included in the working place examinations record. Specifically, MSHA is proposing to amend the introductory text of §§ 56.18002(a) and 57.18002(a) in the 2017 rule on when examinations must begin, and the

record requirements in paragraphs (b) and (c); MSHA is not proposing to modify paragraphs (a)(1) and (2) regarding miner notification and corrective action requirements. Further, MSHA is not proposing to change the record retention requirements or the record availability requirements included in the 2017 rule.

The Agency believes that the proposed changes would be as protective as the existing rules. Also, the proposal would reduce the regulatory burden on mine operators compared to requirements in the 2017 rule and would be consistent with the Administration's initiatives to reduce and control regulatory costs.

*B. Before Work Begins or as Miners Begin Work*

The standards for examinations of working places in MNM mines at 30 CFR 56.18002 and 57.18002 were promulgated in 1979 and are the standards currently in effect. The currently effective standards permit the examination to be made at any time during the shift. Sections 56.18002(a) and 57.18002(a) require a competent person designated by the mine operator to examine each working place at least once each shift for conditions that may

adversely affect safety or health. In addition, §§ 56.18002(a) and 57.18002(a) require the operator to promptly initiate appropriate action to correct such conditions.

On January 23, 2017, MSHA published a final rule (82 FR 7680) that amended §§ 56.18002(a) and 57.18002(a) to require that the examination be conducted before miners begin work in that place so that conditions that may adversely affect miners' safety and health are identified before miners are exposed to those conditions and corrective action is promptly initiated.

MSHA is now proposing to modify the introductory text of §§ 56.18002(a) and 57.18002(a) in the 2017 rule to require the competent person to examine each working place at least once each shift before work begins or as miners begin work in that place for conditions that may adversely affect safety or health. This proposed change to §§ 56.18002(a) and 57.18002(a) would allow the competent person to conduct the examination before work begins or as miners begin their work in a place. To provide mine operators flexibility on scheduling working place examinations, MSHA's proposed change would allow miners to enter a working place at the same time that the competent person conducts the examination. As in the 2017 rule, MSHA's proposal would not require a specific time frame for the examination to be conducted. However, MSHA intends that the examination should be conducted in a time frame sufficient to assure any adverse conditions would be identified before miners are exposed. Under the proposal, the competent person would identify adverse conditions that can be corrected promptly, and promptly notify miners of those that cannot be corrected before miners are exposed. In that way, miners could avoid and not be exposed to those adverse conditions. The operator would still be responsible for correcting those conditions that can be corrected promptly. MSHA recognizes that mining is dynamic, conditions are always changing, and adverse conditions need to be identified and addressed throughout the shift, not just at the beginning. If adverse conditions are identified, miners should be notified before being exposed, or as soon as possible after work begins if the condition is discovered while they are working in an area.

MSHA believes this proposed change would be more protective than the standards in effect, which allow the examination to be made at any time during the shift. Also, under this proposal, since MSHA expects adverse

conditions would be identified before miners are potentially exposed to them, the proposal is as protective as the 2017 rule.

Furthermore, in the 2017 rule, MSHA acknowledged that for mines with consecutive shifts or those that operate on a 24-hour, 365-day basis, it may be appropriate to conduct the examination for the next shift at the end of the previous shift. 82 FR 7683. The proposed change would continue to permit mine operators to conduct an examination on the previous shift. However, as MSHA stated in the 2017 rule, because conditions at mines can change, operators should examine at a time sufficiently close to the start of the next shift to minimize potential exposure to conditions that may adversely affect miners' safety or health.

### C. Record of Adverse Conditions

The currently effective standards at §§ 56.18002(b) and 57.18002(b) require, in part, that mine operators make a record that the working place examinations were conducted.

Under the 2017 rule, §§ 56.18002(b) and 57.18002(b) require operators to make a record of the working place examination and include, among other information, a description of each condition found that may adversely affect the safety or health of miners. In the preamble to the 2017 rule, MSHA noted that the record must include a description of adverse conditions that are corrected immediately. 82 FR 7686. The preamble explained that recording all adverse conditions, even those that are corrected immediately, would be useful in identifying trends and areas that could benefit from an increased safety emphasis.

However, MSHA recognizes that it is the mine operator who is responsible for design of the mine's safety program and that having a recording exception for conditions that are corrected promptly would provide operators with increased incentives to correct these conditions promptly, which may improve miner safety and health. For this reason, MSHA is considering modifying §§ 56.18002(b) and 57.18002(b) to require that the examination record include only those adverse conditions that are not corrected promptly.

MSHA also is considering a conforming change to modify §§ 56.18002(c) and 57.18002(c) of the 2017 rule, which requires the examination record to include, or be supplemented to include, the date of corrective action when any condition that may adversely affect safety or health is corrected. To be consistent with MSHA's proposed change to

§§ 56.18002(b) and 57.18002(b), MSHA would require in §§ 56.18002(c) and 57.18002(c) that the record include, or be supplemented to include, the date of corrective action for an adverse condition that is not promptly corrected.

MSHA's proposal is based on the recognition that, consistent with industry best practices, prudent operators routinely correct many adverse conditions as the competent person is making the examination or as soon as possible after the completion of the examination, and that the corrective action may be taken either by the competent person or someone else. The Agency believes that the primary concern should be with respect to those adverse conditions that are not corrected promptly because they may expose miners to conditions that may potentially cause an accident, injury, or fatality. Consistent with the explanation in the preamble to the 2017 rule, MSHA interprets "promptly" to mean before miners are potentially exposed to adverse conditions.

Also, the proposed change to §§ 56.18002(b) and 57.18002(b) would be consistent with MSHA's miner notification provisions under the 2017 rule at §§ 56.18002(a)(1) and 57.18002(a)(1). Those provisions require mine operators to promptly notify miners in affected areas of any conditions found that may adversely affect their safety or health. In the preamble to the 2017 rule, MSHA reiterated that, if an adverse condition is corrected before miners begin work, notification to miners in affected areas is not required because there are no miners that would be affected by the adverse condition. Similarly, under proposed paragraph (b), adverse conditions that are corrected promptly no longer present a danger to miners and a description of the adverse condition would not be required as part of the examination record under this proposed rule. MSHA believes that this change to §§ 56.18002(b) and 57.18002(b) may improve safety over the existing standards by encouraging mine operators to correct adverse conditions as they are found before they potentially cause an accident, injury, or fatality.

Overall, MSHA believes that the proposed rule would be more protective of miners than the existing standards under §§ 56.18002 and 57.18002. The proposed rule encourages early identification and prompt correction of adverse conditions to protect miners. If corrected promptly, adverse conditions would not be required to be documented in the record. However, adverse conditions that are not

corrected promptly would be required to be documented in the record. An examination record with a description of these uncorrected adverse conditions and their dates of correction would permit mine operators to focus on conditions that need the most attention and on best practices to correct these conditions.

**III. Request for Comments**

MSHA is soliciting comments only on the limited changes being proposed: (1) Working place examinations may begin as miners begin work, and (2) adverse conditions that are not corrected promptly and dates of their corrective action must be included in the working place examinations record. The Agency requests that commenters be as specific as possible and include any alternatives, existing practices and experiences, detailed rationales, supporting documentation, and benefits to miners. Comments will assist the Agency in considering changes to the 2017 rule and whether changes would reduce regulatory burdens on mine operators without reducing the protections afforded miners.

**IV. Executive Order 12866: Regulatory Planning and Review; Executive Order 13563: Improving Regulation and Regulatory Review; and Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs**

Executive Orders (E.O.) 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 13771 directs agencies to reduce regulation and control regulatory costs by eliminating at least two existing regulations for each new

regulation, and that the cost of planned regulations be prudently managed and controlled through a budgeting process. This proposed rule is expected to be an EO 13771 deregulatory action. As discussed in this section, MSHA estimates that this proposed rule would result in annual cost savings of \$27.6 million.<sup>1</sup>

Under E.O. 12866, it must be determined whether a regulatory action is “significant” and subject to review by OMB. Section 3(f) of E.O. 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) Having an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as “economically significant”); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this E.O.

Based on its assessment of the costs and benefits, MSHA has determined that this proposed rule would not have an annual effect of \$100 million or more on the economy and, therefore, would not be an economically significant regulatory action pursuant to section 3(f) of E.O. 12866. MSHA requests comments on all cost and benefit estimates presented in this preamble and on the data and assumptions the Agency used to develop estimates. This proposed rule would make changes to provisions that created costs in the 2017 rule, as described in the following sections.

**A. Compliance Cost Baseline**

MSHA estimated that the 2017 rule will result in \$34.5 million in annual

costs for the MNM industry. The Agency estimated that the total undiscounted cost of the final rule over 10 years will be \$345.1 million; at a 3 percent discount rate, \$294.4 million; and at a 7 percent discount rate, \$242.4 million. In the final rule, MSHA estimated costs associated with conducting an examination before work begins, the additional time to make a record, and providing miners’ representatives a copy of the record.

In this proposed rule, MSHA estimates the costs of changes to the 2017 rule that include: (1) An examination of a working place as miners begin work in that place, and (2) the time used to make a record only of adverse conditions that are not corrected promptly and the dates of corrective action for these conditions. For purposes of calculating the costs attributable to this proposed rule, MSHA updated the number of mines and used calendar year 2016 wage and employment data. MSHA also applied 2016 wage and employment data to the 2017 rule to establish a baseline to calculate cost savings.

**B. Affected Employees and Revenue Estimates**

The proposed rule would apply to all MNM mines in the United States. The baseline for costs and net benefits include costs identified in the preamble to the 2017 rule. The changes include updates to the 2016 data on wages, number of mines, and employment. Changes to the baseline that would exist without this proposed rule are not attributable to this proposal. The updates are included for purposes of calculating the cost savings attributable to this proposed rule.

In 2016, there were approximately 11,624 MNM mines employing 140,631 miners, excluding office workers, and 69,004 contractors working at MNM mines. Table 1 presents the number of MNM mines and employment by mine size.

TABLE 1—MNM MINES AND EMPLOYMENT IN 2016

Mine size	Number of mines	Total employment at mines, excluding office workers
1–19 Employees .....	10,428	52,703
20–500 Employees .....	1,174	71,257
501+ Employees .....	22	16,671
Contractors .....		69,004

<sup>1</sup> Except where noted, the analysis presents all dollar values using 2016 dollars.

TABLE 1—MNM MINES AND EMPLOYMENT IN 2016—Continued

Mine size	Number of mines	Total employment at mines, excluding office workers
Total .....	11,624	209,635

Source: MSHA MSIS Data (reported on MSHA Form 7000-2) June 6, 2017.

The U.S. Department of the Interior (DOI) estimated the value of the U.S. mining industry's MNM output in 2016 to be \$74.6 billion.<sup>2</sup> Table 2 presents the hours worked and revenue produced at MNM mines by mine size.

TABLE 2—MNM TOTAL HOURS AND REVENUES IN 2016

Mine size	Total hours reported for year	Revenue (in millions of dollars)
1-19 Employees .....	89,901,269	\$22,294
20-500 Employees .....	153,459,578	40,920
501+ Employees .....	35,396,747	11,390
Total .....	278,757,594	74,604

Source: MSHA MSIS Data (total hours worked at MNM mines reported on MSHA Form 7000-2) and estimated DOI reported mine revenues for 2016. MSHA distributed the totals to mine size using employment and hours data.

### C. Benefits

The proposed rule would modify the 2017 rule's requirements in §§ 56.18002(a) and 57.18002(a) that require the examination be conducted before miners begin work in that place. MSHA is proposing to modify these provisions to require the examination be conducted before work begins or as miners begin work in that place. This proposed change would reduce the cost of the 2017 rule. MSHA is also proposing to modify the 2017 rule's requirements in §§ 56.18001(b) and 57.18002(b) that the examination record include each adverse condition found. MSHA is proposing to modify these provisions to require that the examination record include only those adverse conditions that are not corrected promptly.

MSHA believes these changes to the 2017 rule would not reduce the protections afforded miners; therefore, benefits would remain unchanged, which were unquantified in the 2017 rule, since MSHA was unable to separate the benefits of the new requirements under the 2017 rule from those benefits attributable to conducting a workplace examination under the existing standard. Thus, net benefits for this proposed rule would be positive due to the cost savings.

### D. Compliance Costs

The costs of this proposed rule are associated with conducting examinations of a working place as miners begin work in that place. In the preamble to the 2017 rule, MSHA concluded that MNM mine operators will use a variety of scheduling methods to conduct an examination of a working place before miners begin work (82 FR 7690). For the 2017 rule, MSHA estimated that it will cost approximately \$26.9 million for mine operators examine each working place before miners begin work.

For the 2017 rule estimate, MSHA assumed that operators might use overtime, use different people to backfill for the time shifted to the examination, or experience rescheduling costs to comply with the final rule. The examination was already required prior to the 2017 rule and therefore not an additional cost for either the 2017 rule or this proposed rule. Under this proposed rule, mine operators would not be required to make the 2017 rule changes to the examination timing that were estimated to add \$26.9 million for overtime, backfill, and rescheduling. The proposed change in the examination timing would allow mine operators to avoid the additional \$26.9 million and therefore create a cost savings. MSHA requests comment on this estimate. MSHA updated the cost estimate for the number of mines and

labor costs which results in an estimated annual cost savings of \$27.6 million.

The 2017 rule also amended the standards currently in effect by specifying the contents of the examination record, which included a requirement that a record include a description of each adverse condition found. Under this proposed rule, MSHA would modify the required contents of the examination record by requiring a description of each adverse condition that is not corrected promptly. MSHA assumes that the cost related to the proposed change to the recordkeeping requirements would be de minimis. MSHA seeks comment on the Agency's assumption and solicits information and data on the number of instances adverse conditions are promptly corrected and on average how much time would be saved by not requiring these corrected conditions to be included in the record.

MSHA updated the number of mines and applied 2016 wage and employment data to the 2017 rule to establish a baseline to calculate cost savings. MSHA estimates that the competent person making the record of the examination of working places would earn \$35.28 per hour (including benefits). In addition, the estimated wage rate of a clerical worker who makes a copy of the record is \$24.44 per hour (including benefits). The wage rates are from the Bureau of Labor

<sup>2</sup> Revenue estimates are from DOI, U.S. Geological Survey (USGS), Mineral Commodity Summaries 2017, January 2017, page 9.

Statistics (BLS), Occupation Employment Statistics (OES) May 2016 survey.<sup>3</sup> 4 Updating the 2017 rule's costs results in a new examination cost base of \$27.6 million annually or approximately a \$0.7 million increase. MSHA also restates the 2017 rule estimates that—

- Mines with 1–19 employees operate 1.1 shift per day, 169 days per year;
- Mines with 20–500 employees operate 1.8 shifts per day, 285 days per year; and
- Mines with 500+ employees operate 2.2 shifts per day, 322 days per year.

#### Overhead Costs

MSHA notes that the Agency did not include an overhead labor cost in the economic analysis for this proposed rule. It is important to note that there is not one broadly accepted overhead rate and that the use of overhead to estimate the marginal costs of labor raises a number of issues that should be addressed before applying overhead costs to analyze the costs of any specific regulation. There are several approaches to look at the cost elements that fit the definition of *overhead* and there are a range of overhead estimates currently used within the federal government—for example, the Environmental Protection Agency has used 17 percent,<sup>5</sup> and the Employee Benefits Security Administration has used 132 percent on average.<sup>6</sup> Some overhead costs, such as advertising and marketing, may be more closely correlated with output rather than with labor. Other overhead costs

vary with the number of new employees. For example, rent or payroll processing costs may change little with the addition of 1 employee in a 500-employee firm, but those costs may change substantially with the addition of 100 employees. If an employer is able to rearrange current employees' duties to implement a rule, then the marginal share of overhead costs such as rent, insurance, and major office equipment (e.g., computers, printers, copiers) would be very difficult to measure with accuracy (e.g., computer use costs associated with 2 hours for rule familiarization by an existing employee). For this proposed rule, comparability is also a problem. The January 2017 rule is not in effect and therefore additional overhead costs have not been incurred and are unlikely to be incurred in the short term. Guidance on implementing Executive Order 13371<sup>7</sup> also provides general guidance that applies in this situation:

For E.O. 13771 deregulatory actions that revise or repeal recently issued rules, agencies generally should not estimate cost savings that exceed the costs previously projected for the relevant requirements, unless credible new evidence show that costs were previously underestimated.

If MSHA had included an overhead rate when estimating the marginal cost of labor, without further analyzing an appropriate quantitative adjustment, and adopted for these purposes an overhead rate of 17 percent on base wages, the overhead costs would increase cost savings from \$27.6 million

to \$32.3 million at all discount rates. This increase in savings of \$4.7 million is the same 17 percent overhead rate as all rule costs are labor costs and therefore change in direct proportion to the rates selected.

MSHA will continue to study overhead costs to ensure regulatory costs are appropriately attributed without double counting or showing savings for concepts not previously considered as costs.

#### Discounting

Discounting is a technique used to apply the economic concept that the preference for the value of money decreases over time. In this analysis, MSHA provides cost totals at zero, 3, and 7 percent discount rates. The zero percent discount rate is referred to as the undiscounted rate. MSHA used the Excel Net Present Value (NPV) function to determine the present value of costs and computed an annualized cost from the present value using the Excel PMT function.<sup>8</sup> The negative value of the PMT function provides the annualized cost over 10 years at a 3 and 7 percent discount rate using the function's end of period option.

#### Summary of Cost Savings

The following table shows the published 2017 rule costs, changes due to updating the base, and the resulting proposed rule cost savings (cost reductions have a negative sign and are a cost savings).

TABLE 3—UNDISCOUNTED COSTS, CHANGES, AND REGULATORY SAVINGS  
(Annual values, \$ millions)

	Recordkeeping	Examination timing	Total (may not sum due to rounding)
Costs as published in 2017 rule (published using 2015 dollars) .....	7.64	26.88	34.51
Changes due to updated 2016 baseline data .....	0.24	0.72	0.95
Total 2016 baseline .....	7.88	27.60	35.47

<sup>3</sup> OES data are available at <http://www.bls.gov/oes/tables.htm> or at [http://www.bls.gov/oes/oes\\_queries.htm](http://www.bls.gov/oes/oes_queries.htm). The employment-weighted mean wage rates are for Extraction Workers (Standard Occupational Classification code, SOC, 47–500) and General Office Clerks (Standard Occupational Classification code, SOC, 43–9061) for Metal Ore Mining (NAICS 212200) and Nonmetallic Mineral Mining and Quarrying (NAICS 212300). The OES wages represent the average for the entire industry and are used nationally for many federal estimates and programs. As with any average, there are always examples of higher and lower values, but the national average is the appropriate value for a rule that regulates an entire industry.

<sup>4</sup> The wage rate without benefits was increased for a benefit-scalar of 1.48. The benefit-scalar comes from BLS Employer Costs for Employee Compensation access by menu <http://www.bls.gov/data/> or directly with <http://data.bls.gov/timeseries/CIU2010000405000I>. The data series

CIU201000040500I, Private Industry Total benefits for Construction, extraction, farming, fishing, and forestry occupations, is divided by 100 to convert to a decimal value. MSHA used the latest 4-quarter moving average 2016 Qtr. 1–2016 Qtr. 4 to determine that 32.5 percent of total loaded wages are benefits. The scaling factor is a detailed calculation, but may be approximated with the formula and values  $1 + (\text{benefit percentage} / (1 - \text{benefit percentage})) = 1 + (0.325 / (1 - 0.325)) = 1.48$ . Additionally, wage inflation is applied. Wage inflation is the change in Series ID: CIS2020000405000I; Seasonally adjusted; Series Title: Wages and salaries for Private industry workers in Construction, extraction, farming, fishing, and forestry occupations, Index. (Qtr. 4 2016/Qtr. 2 2016 =  $126.7 / 125.5 = 1.01$ ).

<sup>5</sup> U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002.

<sup>6</sup> For a further example of overhead cost estimates, please see the Employee Benefits Security Administration's guidance at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-august-2016.pdf>.

<sup>7</sup> Memorandum: Implementing Executive Order 13771, Titled "Reducing Regulation and Controlling Regulatory Costs, M–17–21", April 5, 2017, Question 21, <https://www.whitehouse.gov/the-press-office/2017/04/05/memorandum-implementing-executive-order-13771-titled-reducing-regulation>.

<sup>8</sup> Office of Management and Budget, Office of Information and Regulatory Affairs, Regulatory Impact Analysis: Frequently Asked Questions, February 7, 2011.

TABLE 3—UNDISCOUNTED COSTS, CHANGES, AND REGULATORY SAVINGS—Continued  
[Annual values, \$ millions]

	Recordkeeping	Examination timing	Total (may not sum due to rounding)
Regulatory savings of proposed rule (change from updated base, negative values = cost savings) .....	0.00	-27.60	-27.60

MSHA estimates that the total undiscounted costs of the proposed rule over a 10-year period would be approximately -\$276 million, -\$235.4 million at a 3 percent rate, and -\$193.8 million at a 7 percent rate. Negative cost values are cost savings that result in a positive net benefit. The same annual cost savings occurs in each of the 10 years so the cost annualized over 10 years would be approximately -\$27.60 million for all discount rates.

## V. Feasibility

### A. Technological Feasibility

The proposed rule contains recordkeeping requirements and is not technology-forcing. MSHA concludes that the proposed rule would be technologically feasible.

### B. Economic Feasibility

MSHA established the economic feasibility of the 2017 rule using its traditional revenue screening test—whether the yearly impacts of a regulation are less than one percent of revenues—to establish presumptively that the 2017 rule was economically feasible for the mining community. This proposed rule creates a cost (savings) of -\$27.6 million annually compared to the 2017 rule. Although the associated revenues decreased slightly from the 2017 rule estimate of \$77.6 billion in 2015 to approximately \$74.6 billion for 2016, the costs retained from the 2017 rule of approximately \$7.9 million per year remains well less than one percent of revenues and the net decrease in costs is even more supportive of the Agency's conclusion. MSHA concludes that the proposed rule would be economically feasible for the MNM mining industry.

## VI. Regulatory Flexibility Analysis and Small Business Regulatory Enforcement Fairness Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

MSHA has reviewed the proposed rule to assess and take appropriate account of its potential impact on small businesses, small governmental jurisdictions, and small organizations. MSHA has determined that the

proposed rule would not have a significant economic impact on a substantial number of small entities but requested comments in Section IV. of this preamble.

Pursuant to the Regulatory Flexibility Act (RFA) of 1980, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA), MSHA has analyzed the impact of the proposed rule on small entities. Based on that analysis, MSHA certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities. The Agency, therefore, is not required to develop an initial regulatory flexibility analysis. MSHA presents the factual basis for this certification below.

### A. Definition of a Small Mine

Under the RFA, in analyzing the impact of a rule on small entities, MSHA must use the Small Business Administration's (SBA's) definition for a small entity, or after consultation with the SBA Office of Advocacy, establish an alternative definition for the mining industry by publishing that definition in the *Federal Register* for notice and comment. MSHA has not established an alternative definition and, therefore, must use SBA's definition. On February 26, 2016, SBA's revised size standards became effective. SBA updated the small business thresholds for mining by establishing a number of different levels. MSHA used the new SBA standards for the screening analysis of the final rule.

MSHA has also examined the impact of the proposed rule on mines with fewer than 20 employees, which MSHA and the mining community have traditionally referred to as "small mines." These small mines differ from larger mines not only in the number of employees, but also in economies of scale in material produced, in the type and amount of production equipment, and in supply inventory. Therefore, the impact of MSHA's rules and the costs of complying with them will also tend to differ for these small mines. This analysis complies with the requirements of the RFA for an analysis of the impact on "small entities" using both SBA's

definition for small entities in the mining industry and MSHA's traditional definition.

### B. Factual Basis for Certification

MSHA initially evaluates the impacts on small entities by comparing the estimated compliance costs of a rule for small entities in the sector affected by the rule to the estimated revenues for the affected sector. When this threshold analysis shows estimated compliance costs have been less than one percent of the estimated revenues, the Agency has concluded that it is generally appropriate to conclude that there is no significant adverse economic impact on a substantial number of small entities.

Additionally, there is the possibility that a rule might have a positive economic impact. To properly apply MSHA's traditional criteria and consider the positive impact case, MSHA is adjusting its traditional threshold analysis criteria to consider the absolute value of one percent rather than only the adverse case. This slight change means when the absolute value of the estimated compliance costs exceed one percent of revenues, MSHA investigates whether further analysis is required. For small entities impacted by this proposed rule, MSHA estimates the revenue at \$63.2 billion and costs at -\$30.3 million. As a percentage, the absolute value of the impact is less than 0.05 percent; therefore, using the threshold analysis, MSHA concludes no further analysis is required and concludes the proposed rule would not have a significant impact on a substantial number of small entities. MSHA requests comments on this conclusion.

## VII. Paperwork Reduction Act of 1995

The proposed changes due to this rulemaking are unlikely to change the number of collections or respondents in the currently approved collection 1219-0089. The minor recordkeeping change may reduce the burden very slightly but MSHA concludes that any small decrease in the time needed to make the record may not be measurable. MSHA requested comments on this issue in Section IV. of this preamble but is not

requesting any change to the approved collection at this time.

### VIII. Other Regulatory Considerations

#### A. The Unfunded Mandates Reform Act of 1995

MSHA has reviewed the proposed rule under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 *et seq.*). MSHA has determined that this proposed rule does not include any federal mandate that may result in increased expenditures by State, local, or tribal governments; nor will it increase private sector expenditures by more than \$100 million (adjusted for inflation) in any one year or significantly or uniquely affect small governments. Accordingly, the Unfunded Mandates Reform Act requires no further Agency action or analysis.

#### B. The Treasury and General Government Appropriations Act of 1999: Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires agencies to assess the impact of Agency action on family well-being. MSHA has determined that this proposed rule will have no effect on family stability or safety, marital commitment, parental rights and authority, or income or poverty of families and children. Accordingly, MSHA certifies that this proposed rule would not impact family well-being.

#### C. Executive Order 12630: Government Actions and Interference With Constitutionally Protected Property Rights

Section 5 of E.O. 12630 requires Federal agencies to "identify the takings implications of proposed regulatory actions . . ." MSHA has determined that this proposed rule does not include a regulatory or policy action with takings implications. Accordingly, E.O. 12630 requires no further Agency action or analysis.

#### D. Executive Order 12988: Civil Justice Reform

Section 3 of E.O. 12988 contains requirements for Federal agencies promulgating new regulations or reviewing existing regulations to minimize litigation by eliminating drafting errors and ambiguity, providing a clear legal standard for affected conduct rather than a general standard, promoting simplification, and reducing burden. MSHA has reviewed this proposed rule and has determined that it would meet the applicable standards

provided in E.O. 12988 to minimize litigation and undue burden on the Federal court system.

#### E. Executive Order 13132: Federalism

MSHA has determined that this proposed rule does not have federalism implications because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, E.O. 13132 requires no further Agency action or analysis.

#### F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

MSHA has determined that this proposed rule does not have tribal implications because it will not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175 requires no further Agency action or analysis.

#### G. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

E.O. 13211 requires agencies to publish a statement of energy effects when a rule has a significant energy action that adversely affects energy supply, distribution, or use. In its 2017 rule, MSHA reviewed the rule for its energy effects. The impact on uranium mines is applicable in this case. MSHA data show only two active uranium mines in 2016. Because this proposed rule would have a net cost savings, MSHA has concluded that it would not be a significant energy action because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Accordingly, under this analysis, no further Agency action or analysis is required.

#### List of Subjects in 30 CFR Parts 56 and 57

Metals, Mine safety and health, Reporting and recordkeeping requirements.

Wayne D. Palmer,  
Acting Assistant Secretary of Labor for Mine Safety and Health.

For the reasons set out in the preamble, and under the authority of the Federal Mine Safety and Health Act of 1977, as amended by the Mine

Improvement and New Emergency Response Act of 2006, MSHA is proposing to amend chapter I of title 30 of the Code of Federal Regulations as amended by the final rule published on January 23, 2017 (82 FR 7695), effective May 23, 2017, and delayed on May 22, 2017 (82 FR 23139), until October 2, 2017 (82 FR 23139), as follows:

### PART 56—SAFETY AND HEALTH STANDARDS—SURFACE METAL AND NONMETAL MINES

■ 1. The authority citation for part 56 continues to read as follows:

Authority: 30 U.S.C. 811.

■ 2. In § 56.18002, revise paragraph (a) introductory text, the second sentence of paragraph (b), and paragraph (c) to read as follows:

#### § 56.18002 Examination of working places.

(a) A competent person designated by the operator shall examine each working place at least once each shift before work begins or as miners begin work in that place for conditions that may adversely affect safety or health.

\* \* \* \* \*

(b) \* \* \* The record shall contain the name of the person conducting the examination; date of the examination; location of all areas examined; and description of each condition found that may adversely affect the safety or health of miners and is not corrected promptly.

(c) When a condition that may adversely affect safety or health is not corrected promptly, the examination record shall include, or be supplemented to include, the date of the corrective action.

\* \* \* \* \*

### PART 57—SAFETY AND HEALTH STANDARDS—UNDERGROUND METAL AND NONMETAL MINES

■ 3. The authority citation for part 57 continues to read as follows:

Authority: 30 U.S.C. 811.

■ 4. In § 57.18002, revise paragraph (a) introductory text, the second sentence of paragraph (b), and paragraph (c) to read as follows:

#### § 57.18002 Examination of working places.

(a) A competent person designated by the operator shall examine each working place at least once each shift before work begins or as miners begin work in that place for conditions that may adversely affect safety or health.

\* \* \* \* \*

(b) \* \* \* The record shall contain the name of the person conducting the

examination; date of the examination; location of all areas examined; and description of each condition found that may adversely affect the safety or health of miners and is not corrected promptly.

(c) When a condition that may adversely affect safety or health is not corrected promptly, the examination record shall include, or be supplemented to include, the date of the corrective action.

\* \* \* \* \*

[FR Doc. 2017-19381 Filed 9-11-17; 8:45 am]

BILLING CODE 4520-43-P

## DEPARTMENT OF LABOR

### Mine Safety and Health Administration

#### 30 CFR Parts 56 and 57

[Docket No. MSHA-2014-0030]

RIN 1219-AB87

#### Examinations of Working Places in Metal and Nonmetal Mines

**AGENCY:** Mine Safety and Health Administration, Labor.

**ACTION:** Proposed rule; delay of effective date.

**SUMMARY:** On January 23, 2017, the Mine Safety and Health Administration (MSHA) published a final rule in the *Federal Register* amending the Agency's standards for the examination of working places in metal and nonmetal mines. MSHA is proposing to delay the effective date of the Agency's final rule to March 2, 2018. This extension would offer additional time for MSHA to provide stakeholders training and compliance assistance.

**DATES:** Comments must be received or postmarked by midnight Eastern Daylight Saving Time (DST) on September 26, 2017.

**ADDRESSES:** Submit comments and informational materials, identified by RIN 1219-AB87 or Docket No. MSHA-2014-0030, by one of the following methods:

*Federal E-Rulemaking Portal:* <https://www.regulations.gov>. Follow the on-line instructions for submitting comments.

*Email:* [zzMSHA-comments@dol.gov](mailto:zzMSHA-comments@dol.gov).

*Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202-5452.

*Hand Delivery or Courier:* 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th Floor East, Suite 4E401.

*Fax:* 202-693-9441.

**Instructions:** All submissions must include RIN 1219-AB87 or Docket No. MSHA-2014-0030. Do not include personal information that you do not want publicly disclosed; MSHA will post all comments without change, including any personal information provided.

**Email Notification:** To subscribe to receive email notification when MSHA publishes rulemaking documents in the *Federal Register*, go to <https://www.msha.gov/subscriptions>.

**Docket:** For access to the docket to read comments received, go to <http://www.regulations.gov> or <http://www.msha.gov/currentcomments.asp>. To read background documents, go to <http://www.regulations.gov>. Review the docket in person at MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Arlington, Virginia, between 9 a.m. and 5 p.m. DST Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th Floor East, Suite 4E401.

**FOR FURTHER INFORMATION CONTACT:** Sheila A. McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at [mcconnell.sheila.a@dol.gov](mailto:mcconnell.sheila.a@dol.gov) (email); 202-693-9440 (voice); or 202-693-9441 (facsimile).

#### SUPPLEMENTARY INFORMATION:

##### I. Delay of Effective Date

On January 23, 2017, MSHA published a final rule in the *Federal Register* (82 FR 7680) amending the Agency's standards for the examination of working places in metal and nonmetal mines. The final rule was scheduled to become effective on May 23, 2017. On May 22, 2017, MSHA published a final rule delaying the effective date to October 2, 2017 (82 FR 23139), to assure that mine operators and miners affected by the final examinations rule have the training and compliance assistance they need prior to the rule's effective date.

At this time, the Agency is proposing to delay the rule's effective date beyond October 2, 2017, to March 2, 2018. As MSHA has reiterated to industry stakeholders, MSHA made a commitment to the industry to hold informational meetings around the country and to develop and distribute compliance assistance material prior to enforcing the rule. MSHA also committed to conducting compliance assistance visits at metal and nonmetal mines throughout the country. Further, extending the effective date would permit more time for MSHA to address issues raised by stakeholders during quarterly training calls and stakeholder meetings and compliance assistance

visits. MSHA is considering concerns raised by stakeholders on certain provisions in the rule and how best to address them. MSHA intends to collaborate with and seek input from stakeholders regarding these issues. At the same time, MSHA is seeking comment on a proposed rule that may address some of these issues. The extension also would provide MSHA more time to train its inspectors to help assure consistency in MSHA enforcement. MSHA will make the Agency's inspector training materials available to the mining community to assist miners and mine operators in effectively implementing the rule, thus enhancing the safety of miners.

**Wayne D. Palmer,**

*Acting Assistant Secretary of Labor for Mine Safety and Health.*

[FR Doc. 2017-19380 Filed 9-11-17; 8:45 am]

BILLING CODE 4520-43-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R09-OAR-2017-0332; FRL-9967-56-Region 9]

#### Approval of California Air Plan Revisions, Placer County and Ventura County Air Pollution Control Districts

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve revisions to the Placer County Air Pollution Control District (PCAPCD) and Ventura County Air Pollution Control District (VCAPCD) portions of the California State Implementation Plan (SIP). These revisions concern emissions of oxides of nitrogen (NO<sub>x</sub>) from incinerators in the PCAPCD and previously unregulated types of fuel burning equipment in the VCAPCD. We are proposing to approve local rules to regulate these emission sources under the Clean Air Act (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

**DATES:** Any comments must arrive by October 12, 2017.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R09-OAR-2017-0332 at <http://www.regulations.gov>. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from *Regulations.gov*. For either manner of



Public Comment  
Josie Gaskey - PA Aggregates and Concrete Association  
Before the Mine Safety and Health Administration  
regarding Examinations of Working Places in Metal and Nonmetal Mines  
Wyndham Pittsburgh University Center  
November 2, 2017

Good morning. Thank you for the opportunity to present our comments and we acknowledge your efforts to work with industry. My name is Josie Gaskey and I'm Director of Environmental, Safety and Health for the Pennsylvania Aggregates and Concrete Association (PACA).

PACA represents the broad interests of over 200 member aggregates, cement and concrete companies, and companies supporting these industries (equipment manufacturers, dealers, consultants, and service providers) in the Commonwealth of Pennsylvania.

The aggregate producers in Pennsylvania, many of whom are 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> family generation companies, are highly committed to workplace safety and health. Safety is our family business.

We are concerned about the workplace exam proposed rule because we do not see the need or justification or that the proposed rule will improve safety. MSHA's own data supports this statement. Attached to the back of my testimony, you will find an MSHA graph depicting fatality and all-injury rates from the year 1977-2015. In 2015, the metal nonmetal mine industry injury rate reached an all-time low. Obviously, we are doing something right and we can see no benefit to a new workplace exam standard. Furthermore, the initial workplace exam proposed rule was not based on any finding of unsafe work practices of the existing workplace exam standard.

The current standard gives an operator the flexibility, as well as the responsibility, to establish exams that are effective for a particular workplace. We are concerned that under the proposed rule, the timing of exams does not allow the flexibility the operators need to conduct workplace exams as specific circumstances dictate. The proposed amendment indicates exams would be required “before work begins or as miners begin work in that place.” In some of our facilities, there are only two supervisors on the first shift and they need to examine for example, eight workplaces. On second or third shifts, there may only be one supervisor and eight workers. The proposed rule would require some operators to hire additional personnel. Operators need the flexibility to conduct workplace exams as circumstances dictate, with competent personnel that includes trained supervisors and workers. MSHA must consider hourly miners as competent persons, if they are listed in company training plan and have been provided training in a list of various tasks. MSHA cannot place the entire responsibility for workplace exams on supervisors only.

Furthermore, this portion of the proposed rule violates the spirit and letter of Executive Orders, from both President Trump and former President Obama, to consider regulatory approaches that reduce the burden of regulation while maintaining flexibility and freedom of choice. We request this remain unchanged in the proposed rule.

We are also concerned with the potential for enforcement personnel to issue multiple citations for a single situation, i.e., one for the condition itself and one for the workplace examination. We request that MSHA ensure that no additional enforcement results from revisions to the workplace exam rule.

We foresee challenges with the proposed rule due to vague and imprecise terms and provisions with no clarification. For example, the term “working place.” (56/57.18002(a)) The existing standard differentiates between a “working place” and a “travel-way”. It appears in the proposed rule that MSHA considers areas commonly thought of as travel-ways as a “working place”. The proposed rule should clearly differentiate between a “working place” and a “travel-way”.

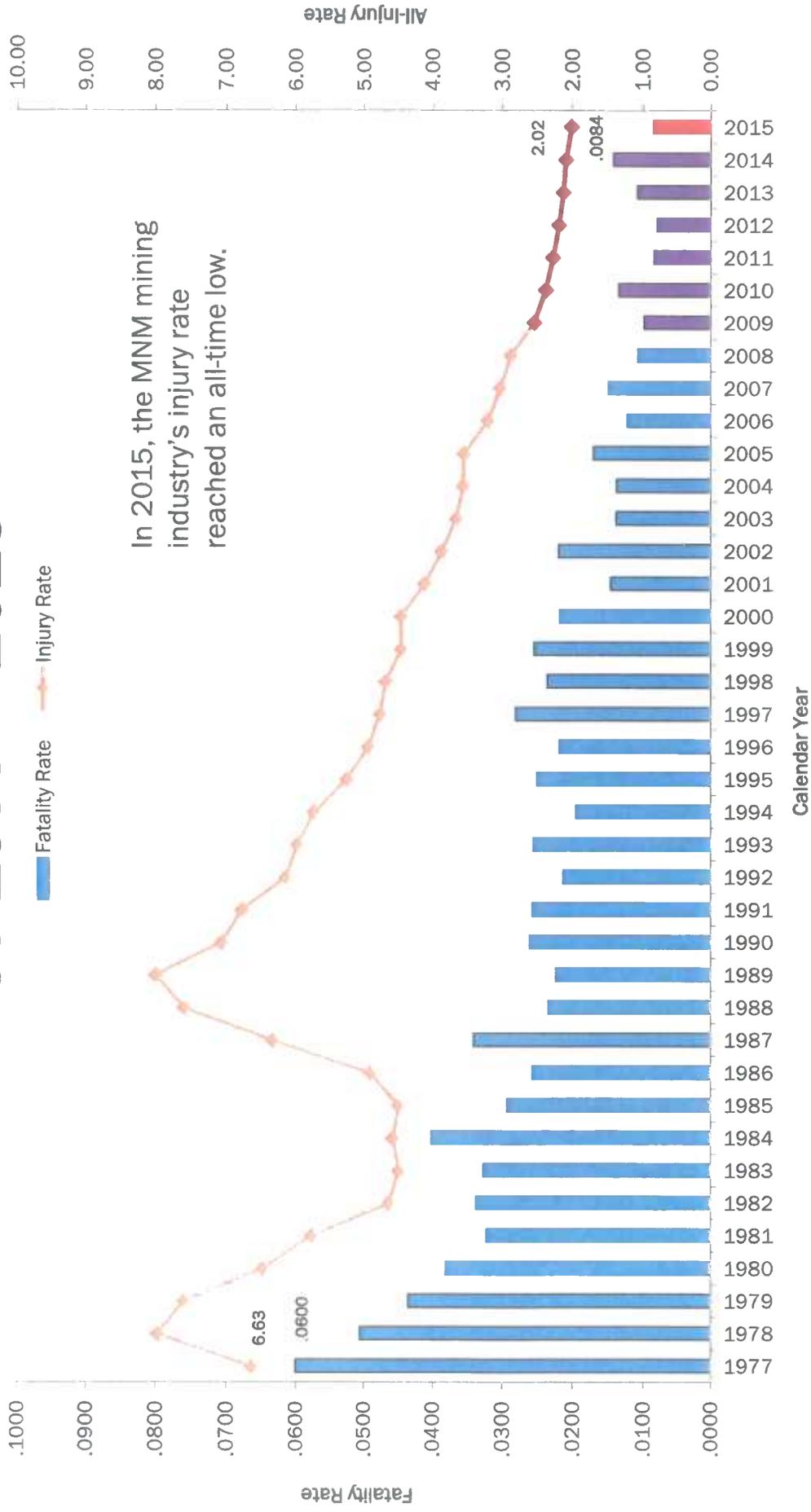
The term “conditions that may adversely affect safety and health.” (56/57.18002(a)(1)) We request MSHA provide a clear definition for this term, as this is the foundation of MSHA rules, as well as the proposed changes.

We have concerns regarding enforcement interpretations of words such as “promptly” and “initiate appropriate action”. These terms need to be defined with sufficient specificity as to provide clear, consistent guidance for both enforcement personnel and the operators.

We will be submitting written comments in coordination with the National Stone, Sand & Gravel Association and support their comments.

Thank you.

# MNM US Mines - Fatality and All-Injury Rates CY 1977 - 2015



Based on Injury Data Reported by Mine Operators