

# TRANSCRIPT OF PROCEEDINGS

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IN THE MINE SAFETY AND HEALTH ADMINISTRATION

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

Pages: 1 through 30

Place: Salt Lake City, Utah

Date: October 26, 2017

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## HERITAGE REPORTING CORPORATION

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EXAMINATIONS OF WORKING )  
PLACES IN METAL AND )  
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PROPOSED RULE )

Salt Lake City, Utah

October 26, 2017

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

Appearances:

MSHA panel: ROSLYN FONTAINE, SAMUEL PIERCE,  
MICHELE CURRAN

Speakers:

ERIK M. DULLEA, Husch Blackwell, counsel to the  
Mining Coalition

TODD R. OHLHEISER, Colorado Stone, Sand & Gravel  
Association

MARK D. COMPTON, Utah Mining Association

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P R O C E E D I N G S

(9:00 a.m.)

MS. FONTAINE: Good morning. My name is Roslyn Fontaine, and I am the Deputy 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 12th, 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 second of four public hearings. The first hearing was held on Tuesday, October 24th, at MSHA headquarters in Arlington, Virginia. The next two will take place on Tuesday, October 31st, in Birmingham, Alabama, and on

1 Thursday, November 2nd, in Pittsburgh, Pennsylvania.

2 I'd like to introduce the members of our  
3 panel. We have Samuel Pierce, the Southeast District  
4 Manager for Metal and Nonmetal Mine Safety and  
5 Health; and Michele Curran from the Office of the  
6 Solicitor. In the front we have Susan Olinger, who  
7 works for the Office of Standards.

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

19 As background, on January 23rd, 2017, MSHA  
20 published a final rule on Examinations of Working  
21 Places in Metal and Nonmetal mines. The effective  
22 date of the final rule was stayed until June 2nd,  
23 2018. This January 2017 final rule, which  
24 strengthens and improves MSHA's existing requirements  
25 for metal and nonmetal examinations of working

1 places, requires a mine operator to: Have a competent  
2 person examine each working place at least once each  
3 shift before miners begin working in that place;

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

7 Promptly initiate action to correct the  
8 adverse conditions;

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

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

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

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

1 such as the definitions of "competent person" and  
2 "working place"; the conditions that may present an  
3 imminent danger; and the retention and availability  
4 of examination records.

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

11 On September 12th, 2017, MSHA published a  
12 proposed rule that would make limited changes to the  
13 January 2017 final rule. The limited changes being  
14 considered would require that examination of a  
15 working place must be conducted before work begins,  
16 or as miners begin work in that place. The  
17 January 2017 final rule requires the examination be  
18 made before miners begin work in the working place.

19 The proposed change will provide operators  
20 additional flexibility in scheduling the working  
21 place examinations by allowing miners to enter a  
22 working place at the same time that a competent  
23 person conducts the examination. However, as noted  
24 in the preamble to the proposed rule, MSHA intends  
25 that the examination be conducted in a time frame

1 sufficient to assure that any adverse conditions be  
2 identified and corrected before miners are exposed.

3 Like the January 2017 final rule, the  
4 proposed rule will continue to permit mine operators  
5 with consecutive shifts, or those that operate on a  
6 24-hour, 365-day basis, to conduct the examination  
7 for the next shift at the end of the previous shift.  
8 As stated in the January 2017 final rule, however,  
9 because conditions at mines can change, MSHA expects  
10 that operators will conduct examinations at a time  
11 sufficiently close to the start of the next shift to  
12 minimize miners' potential exposure to conditions  
13 that may adversely affect their safety or health.  
14 And the examination record must include descriptions  
15 of adverse conditions that are not corrected  
16 promptly, and the dates of corrective action for  
17 these conditions.

18 The January 2017 final rule requires that  
19 each adverse condition be documented in the  
20 examination record. The proposed rule, however,  
21 would reduce the mine operator's recordkeeping burden  
22 by requiring that the examination record include a  
23 description only of each adverse condition that is  
24 not corrected promptly. A similar conforming change  
25 would require that the examination record include the

1 dates of corrective action for only those adverse  
2 conditions that are not corrected promptly.  
3 Therefore, under the proposed rule, when adverse  
4 conditions are corrected promptly, there would be no  
5 requirement that the examination record include  
6 descriptions either of those corrected adverse  
7 conditions or of corrective action dates for those  
8 conditions. MSHA interprets the term "promptly" to  
9 mean before miners are potentially exposed to adverse  
10 conditions.

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

14 We are requesting comments and information  
15 from the mining community only on these limited  
16 changes in the proposed rule, that is, the timing of  
17 the working place examination, and documenting  
18 adverse conditions and corrective action dates in the  
19 examination record, and how these proposed changes  
20 may affect the safety and health of miners.

21 We also request comments on all cost and  
22 benefit estimates presented in the preamble to the  
23 proposed rule and on the data and assumptions the  
24 Agency used to develop these estimates. This  
25 includes the Agency's assumptions on a number of

1 instances adverse conditions are promptly corrected  
2 and time saved by not requiring these corrected  
3 conditions to be included in the record.

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

10 MSHA will make available a verbatim  
11 transcript of this public hearing approximately two  
12 weeks from the completion of the hearing. You may  
13 view the transcripts of all public hearings and  
14 comments on our website at [msha.gov](http://msha.gov) and on  
15 [regulations.gov](http://regulations.gov).

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

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

1                   Please also be advised that on  
2                   October 5th, 2017, MSHA published a final rule to  
3                   stay the effective date of the January 2017  
4                   examinations final rule to June 2nd, 2018. This  
5                   delay will allow MSHA additional time and flexibility  
6                   to provide compliance assistance to industry, and  
7                   training to stakeholders and MSHA inspectors on the  
8                   final rule requirements. Meanwhile, MSHA will  
9                   continue to enforce the rule you've all been working  
10                  under so far.

11                  So with that, I would like to introduce  
12                  our first speaker. Our first speaker today is  
13                  Eric Dullea with Husch Blackwell.

14                  Good morning, Mr. Dullea.

15                  MR. DULLEA: Good morning.

16                  MS. FONTAINE: Would you please state and  
17                  spell your name for the court reporter?

18                  MR. DULLEA: You bet.

19                  MS. FONTAINE: Thank you.

20                  MR. DULLEA: How is the audio? Good.

21                  MS. FONTAINE: Yes.

22                  MR. DULLEA: For the panel, thank you for  
23                  conducting this hearing. My name is Eric Dullea. It  
24                  is spelled D-u-l-l-e-a. I'm senior counsel with  
25                  Husch Blackwell, and a member of the firm's workplace

1 safety group.

2 I'm here on behalf of the Mining  
3 Coalition, which is an informal group of companies  
4 subject to MSHA jurisdiction that support continuing  
5 safety improvements and sound regulations.

6 The panel may be aware that we have been  
7 involved in this rulemaking and the commenting  
8 process since the rule's inception and, therefore, we  
9 ask that you incorporate our previous comments and our  
10 post-hearing submissions from 2016 into the record.

11 We oppose the original rule and the  
12 amendments to the final rule, as stated, that were  
13 promulgated on January 23rd, because its changes to  
14 40 years of successful regulation and mining  
15 procedure are not justified, and the changes will  
16 cause confusion and end the successful  
17 implementation, flexibility and safety benefits that  
18 exist now under 56/57.18002, known as the Workplace  
19 Exam Rule.

20 The preamble to the final rule  
21 acknowledges, and I do not dispute it, that mining  
22 occurs in a dynamic environment. The conditions are  
23 always changing, and adverse conditions need to be  
24 identified and addressed throughout a shift.

25 Yet despite this truth, MSHA continues to

1     insist that workplace exams be performed before  
2     mines -- miners begin working, which implicitly means  
3     that these workplace exams would take place before  
4     those conditions start to change.

5             I give you an example of hard rock  
6     development mining. The mining cycle for that  
7     activity consists of drilling, loading, blasting,  
8     mucking, scaling and bolting. And then you repeat  
9     that cycle.

10            Many operators will change shifts after  
11     the blasting is done. That allows them to have their  
12     miners exit the area, detonate, allow the smoke,  
13     fumes and hazards to clear, and then the new shift  
14     goes in and will start with the muck cycle. In  
15     mucking, you're removing the blasted rock from the  
16     area and then proceeding on with the next activity.

17            If the workplace exam needs to be done  
18     before those miners begin work, or right when they  
19     arrive, that exam is being done before the mucking  
20     takes place or is finished. The miners haven't had a  
21     chance to adequately look at that area, because it's  
22     still filled with debris and rock.

23            In addition, scaling and bolting are  
24     activities that have hazards of their own. Miners  
25     are put -- drilling holes into new rock. They are

1 working under canopies. There are chances that rip  
2 falls or roof falls could occur. If they need to  
3 step out from under those protective canopies, they  
4 would be exposed to new hazards that are not covered  
5 by this rule.

6 We think that for activities such as this  
7 cycle, it is essential that the operator have the  
8 flexibility to conduct that workplace exam at a time  
9 that is proper for the hazards that exist in that  
10 location.

11 We do support MSHA's recent decision to  
12 delay the implementation of this rule and ask for  
13 more comments. We believe that the Mine Act and  
14 President Trump's memorandum permits MSHA to  
15 reexamine this entire rulemaking process, withdraw  
16 the final rule and reinstate the original rule.

17 As we've said in the past, we do not  
18 understand why MSHA chose to rush this rule through  
19 at the end of the previous administration.

20 President Trump announced on January 20th  
21 his memorandum ordering a regulatory freeze, yet this  
22 final rule was published on January 23rd, three days  
23 later.

24 MSHA's efforts essentially ignore the  
25 presidential directive. On its face, the Agency

1 appears to be acting contrary to the intent and the  
2 desire of the incoming executive leadership.

3 The 1802 workplace exam has been used  
4 successfully in the metal/nonmetal industry since  
5 1979. It has been performed literally millions of  
6 times, and yet in the original final rule and in the  
7 amendments, MSHA has not laid out any empirical data  
8 or quantitative basis which support this change.

9 We would renew our request that MSHA  
10 provide any data or analysis that it's performed that  
11 can -- lays out an empirical, objective argument for  
12 why this change was put in place.

13 We're not aware of any stakeholders or  
14 proponents that asked for this rule. Therefore, from  
15 our standpoint, it appears to be a solution that is  
16 in search of a problem.

17 Specific issues that we see with the rule  
18 include the following. The new rule is going to  
19 divert resources from finding and fixing problems and  
20 proactively pursuing safety, to keeping up with a  
21 significant burden of added paperwork.

22 The rule diverts the miners' attention and  
23 requires overly broad notifications of hazards, even  
24 minor hazards. And by that term "minor" I do mean  
25 m-i-n-o-r.

1           There is the requirement of superfluous  
2 notifications of hazards that have been corrected,  
3 which are likely to lead to information overload for  
4 miners by inundating them with information that is  
5 not related to their immediate tasks.

6           Rather than empower individual miners and  
7 emphasize the importance of continued vigilance and  
8 proactive examination of their work area for hazards,  
9 this rule gives -- opens the door for the potential  
10 of a false sense of security for miners to believe  
11 that a workplace exam was already done and,  
12 therefore, they can let their vigilance slip. That  
13 is greatly troubling to us.

14           Based on the volume of communications that  
15 are going to have to take place under this rule,  
16 there is a risk of alarm fatigue, whereby too many  
17 warnings become background noise and miners will not  
18 be able to sift the wheat from the chaff and identify  
19 hazards that may pertain to them during the course of  
20 their shift.

21           Regrettably, there is also the potential,  
22 because of the subjective nature of the paperwork  
23 that's required with this rule, that it will  
24 exacerbate tensions or an adversarial relationship  
25 between inspector and mine operators, essentially

1 creating a "gotcha" environment where inspectors will  
2 search through paperwork to look for hidden flaws  
3 that have arisen in the past year and issue citations  
4 for the paperwork errors, as opposed to focusing on  
5 the hazards that exist today or in the future.

6 I know Ms. Fontaine raised the question  
7 and -- or discussed the new definitions -- or the  
8 clarifications that are in this rule. I would like  
9 to verify and have MSHA make clear whether the  
10 definition of a working place or a work area is going  
11 to exclude travelways from this obligation, or does  
12 MSHA expect and envision that miners, as they travel  
13 in large underground mines, across miles by vehicle,  
14 that they will be conducting workplace exams through  
15 those travelways before they reach the area where  
16 production work will begin.

17 The new definitions, as far as "before  
18 work begins" or "as work begins," may have been  
19 intended to give operators flexibility, but there is  
20 still vagueness in those terms that will trigger  
21 additional questions and confusion for the operators.

22 One question that comes up is for the  
23 paperwork that needs to be addressed when hazards are  
24 not promptly corrected. If that hazard is identified  
25 and documented across one, two or three shifts, and

1 let's say that the area has been buried or barricaded  
2 off, or warning signs have been put up, and then  
3 corrective action is taken on the fourth shift,  
4 miners have not been exposed to the hazard because  
5 they were warned to stay away, and that condition was  
6 documented on three or four pieces of paper, does the  
7 corrective action need to be documented on all four  
8 pieces of paper, or will one corrective entry  
9 suffice?

10 I can see a situation where mine  
11 inspectors would look at one piece of paper, not see  
12 a corrective action and be concerned. And then where  
13 does the burden of proof lie for the operator to find  
14 the cross-referenced paperwork to show that the  
15 hazard was eventually corrected?

16 The opposite situation arises where the  
17 safety department or the lead man or the foreman  
18 needs to go back and sift through the last week's  
19 worth of workplace exams and make sure that all of  
20 the I's are dotted and all of the T's are crossed.  
21 That's causing that supervisor to be heads down,  
22 focused on paperwork and not taking care of his  
23 miners.

24 My last concern is with the term  
25 "promptly" and how that will be applied during

1 enforcement action.

2 As Ms. Fontaine mentioned it, it is  
3 currently defined to mean before miners are  
4 potentially exposed to adverse conditions.

5 That is an inherently subjective term that  
6 is vulnerable to multiple interpretations out in the  
7 field. MSHA has not defined whether there is an  
8 element of time for that definition or if it is  
9 viewed in terms of distance or foot travel before  
10 miners reach a workplace.

11 And then, how likely does the potential  
12 exposure need to be? That conclusion could vary  
13 widely across inspectors out in the field and lead to  
14 inconsistent enforcement efforts.

15 An example I would give you is scaling  
16 loose ground as the competent person enters a  
17 workplace with his crew or her crew behind them. How  
18 far in advance does that miner need to do the scaling  
19 in order to say that it was promptly corrected?

20 At the present time, the final rule does  
21 not give us guidance on that. At a minimum, we ask  
22 that MSHA provide clear, objective parameters on how  
23 the term "promptly corrected" will be applied and  
24 enforced.

25 In summary, the 2017 final rule violates

1 President Trump's freeze on regulatory enforcement  
2 actions, the Administrative Procedures Act and the  
3 Mine Act. It is counterproductive to safety and will  
4 put an increased paperwork burden on operators, with  
5 minimal quantitative benefit to advance the safety of  
6 miners. And for that reason, we ask that it be  
7 withdrawn and the original rule be reinstated.

8 I thank you for the opportunity to speak  
9 this morning.

10 MS. FONTAINE: Thank you.

11 Our next speaker is Todd Ohlheiser.

12 MR. OHLHEISER: Good morning.

13 MS. FONTAINE: Good morning.

14 MR. OHLHEISER: My name is Todd Ohlheiser,  
15 O-h-l-h-e-i-s-e-r. And thanks for the opportunity to  
16 speak today and testify.

17 My role is I'm executive director of the  
18 Colorado Stone, Sand and Gravel Association. So I  
19 represent the construction aggregate mining group  
20 throughout Colorado, which includes, obviously, the  
21 safety interests of several hundred employees.

22 And, additionally, just from a background  
23 perspective, I -- I grew up in the aggregate mining  
24 business through -- you know, worked through as a  
25 laborer and ran several businesses later in my career

1 before taking the executive director role in the U.S.  
2 and Canada. And my son's, you know, an employee at a  
3 sand and gravel operation. So a lot of years of my  
4 background is in this industry.

5 And so I would like to speak in regards to  
6 some things that I see in alignment with the Colorado  
7 Stone, Sand and Gravel Association.

8 Safety has been a guiding principle for  
9 Colorado, as well as the national association -- the  
10 National Stone, Sand and Gravel Association.

11 For many years this commitment is  
12 illustrated in the degree which we've reduced  
13 injuries in the stone, sand and gravel industry over  
14 each of the past 16 years. The injury rate for  
15 stone, sand and gravel now stands at a record low of  
16 1.95 injuries per 200,000 hours worked. We realize  
17 that's too high, but it's going the right direction,  
18 and all of the practices in place now are the ones  
19 getting it there. So -- so we don't, as well, see  
20 need to implement the changes proposed.

21 We acknowledge the effort put forth by the  
22 new administration. There is some relief, but there  
23 is still some inconsistencies and concerns. These  
24 concerns include timing of the examinations, as you  
25 just heard as well. The initial version of the final

1 rule required that workplace examinations be  
2 conducted before miners begin work. MSHA's proposed  
3 to amend the final rule such that examinations would  
4 be required before work begins or as miners begin  
5 work in that place.

6 The proposed amendment does not provide  
7 adequate relief for the following reasons. Operators  
8 need the flexibility to conduct workplace  
9 examinations as circumstances change. Shifts are not  
10 typically uniform at all operations. The existing  
11 workplace examination standards provide the  
12 necessary approach towards safety and required  
13 flexibility. The term "that place" in the proposed  
14 amendment is unclear and could lead to confusion in  
15 the field that raises uncertainty as to where,  
16 specifically, one should examine to cover the work.

17 The final rule, with proposed amendment,  
18 leaves too much uncertainty for enforcement. And  
19 there is a lot of inconsistencies as far as  
20 enforcement, and this is just going to snowball that  
21 to a large degree.

22 Another concern is documentation. MSHA  
23 has proposed to reduce the documentation requirement  
24 of the final rule, such that conditions that are  
25 found promptly corrected would no longer need to be

1 recorded, nor would their corrections.

2 MSHA has advised that for purposes of the  
3 provision "promptly" means before miners are  
4 potentially exposed to adverse conditions.

5 MSHA should consider further revising the  
6 documentation requirement, such that conditions that  
7 are corrected during the shift on which they are  
8 found should not be required to be recorded. This  
9 would further the intent of the amendment for only  
10 requiring recording of conditions that are unable to  
11 be corrected in a timely basis.

12 Operators are concerned that the increased  
13 documentation requirement will lead to additional  
14 enforcement based solely on the examination records.  
15 If any workplace examination standard is to take  
16 effect, operators should be afforded maximum  
17 flexibility in the recording of conditions and  
18 corrections, including use of work orders and  
19 existing electronic databases for documentation.

20 Regarding costs, MSHA's accounting for  
21 costs of the final rule, even with the proposed  
22 amendments, does not appear to consider likely  
23 consequences of the new regulation. It is expected  
24 that operators will need to hire additional employees  
25 simply to manage the requirements of any new

1 workplace examination standard.

2           The lack of clear benefits of any change  
3 to the workplace examination. The initial Workplace  
4 Examination Rule is not predicated on any findings of  
5 unsafe practices with the existing workplace  
6 examination standard, and also, to my knowledge,  
7 could not identify any benefit of the new workplace  
8 examination standard or proposed amendments do  
9 anything to cure this issue.

10           Vague and unclear terms. And this is  
11 where we'll lead to inconsistencies of enforcement.

12           The initial Workplace Examination Final  
13 Rule contained many vague and unclear terms. The  
14 proposed amendments do not offer any clarification of  
15 these terms. Vague and unclear terms include the  
16 term "working place." It remains troublesome that  
17 MSHA appears to consider areas commonly thought of as  
18 travelways as working places, when the existing  
19 standard already differentiates between a working  
20 place and a travelway.

21           The term "conditions that may adversely  
22 affect safety and health" is another issue. During  
23 the comment period proceedings of the final rule,  
24 commenters raised that this term is potentially  
25 ambiguous, and MSHA has not provided a defined

1 guidance of this term. That is particularly  
2 problematic, because examinations of -- for  
3 conditions that may adversely affect safety and  
4 health is the entire reason for the rule, including  
5 the changes contemplated in the proposed amendments.

6 The term "promptly" for purposes of  
7 notification requirement and remediation. The term  
8 is subjective and could result in varying  
9 interpretations of enforcement again.

10 And the last term is to "initiate  
11 appropriate action" for the remediation provision.  
12 This term is, again, subjective.

13 Individual liability. Records maintained  
14 in accordance with workplace examination standards  
15 should not be used for the assessment of individual  
16 liability under Section 110 of the Mine Act against  
17 miners performing examinations.

18 And, finally, duplicate citations for  
19 exams and conditions. Operators are concerned that  
20 any new workplace examination standard will more  
21 readily lead to MSHA inspectors issuing multiple  
22 citations for a single situation; one for the  
23 condition, one for the examination. Operators  
24 request that MSHA ensures this will not be the case.

25 So, in conclusion, I want to thank you for

1 the opportunity. I would -- if there is any  
2 questions, I would certainly try to do my best to  
3 answer those. I will be submitting formal -- formal  
4 comments before the November 13 deadline.

5 MS. FONTAINE: Okay. I would just ask  
6 that you submit your estimates of compliance costs  
7 with your supporting documentation.

8 MR. OHLHEISER: Okay.

9 MS. FONTAINE: Thank you.

10 MR. OHLHEISER: Very good. Thank you.

11 MS. FONTAINE: Our next speaker will be  
12 Mark Compton.

13 Could you please spell your name for the  
14 court reporter?

15 MR. COMPTON: Yes, ma'am.

16 Good morning. I'm Mark Compton, M-a-r-k,  
17 C-o-m-p-t-o-n. I'm the president of the Utah Mining  
18 Association. I appreciate you all holding this  
19 hearing in Salt Lake City today.

20 While an extension of the final rule's  
21 effective date is necessary and appropriate, we  
22 believe that the regulated community and the Agency  
23 itself will be best served by an indefinite  
24 suspension of the effective date until the final  
25 rule's substantive terms are finalized.

1                   There is currently uncertainty as to the  
2 substance of the final rule, for two reasons. One,  
3 concurrent with its proposed extension of the  
4 effective date, MSHA also proposed substantive  
5 amendments to certain provisions of the final rule.  
6 And, two, litigation in the 11th Circuit remains  
7 pending regarding the January 23rd, 2017, final rule.  
8 Briefing in that litigation is complete, and oral  
9 argument is currently scheduled for the week of  
10 December 11th, 2017.

11                   MSHA indicated that it's considering  
12 changes to the final rule to address when workplace  
13 examinations must begin, and the adverse conditions  
14 and related corrective actions that must be included  
15 in the examination record.

16                   MSHA established a deadline of  
17 November 13th, 2017, for comments on the proposed  
18 amendments. It also scheduled four public hearings,  
19 which obviously are now occurring. It is anticipated  
20 that MSHA will subsequently promulgate an amended  
21 final rule following the feedback it receives in  
22 response to the proposed amendments.

23                   In light of this, the substance of the  
24 final rule's provision is currently uncertain, and it  
25 is unknown when it will be finalized. Accordingly,

1 while it is necessary to postpone the final rule's  
2 effective date, it is imprudent to establish any  
3 effective date until the amended final rule is  
4 promulgated and the substance of the rule is known.

5           This is particularly so given MSHA's  
6 stated reasons for proposing the delay of the  
7 effective date. MSHA stated that it intends to  
8 provide the industry with compliance assistance prior  
9 to the effective date, including holding  
10 informational meetings, distributing compliance  
11 assistance materials to operators, conducting  
12 compliance assistance visits to mine sites, providing  
13 specific training to inspectors on the final rule,  
14 and making the inspector training materials available  
15 to the mining community.

16           And it would, of course, be necessary for  
17 the exact terms of the final rule to be known for  
18 these compliance assistance measures to have any  
19 meaning.

20           In light of the uncertainty of when the  
21 final rule's substance -- terms will be known, the  
22 compliance assistance measures cannot yet be  
23 scheduled. Accordingly, an appropriate effective  
24 date cannot be established.

25           Moreover, any effective date must also

1 consider that following the period of compliance  
2 assistance from MSHA, operators will be required to  
3 develop appropriate compliance programs to comply  
4 with the final rule. Operators will then need to  
5 provide the necessary training to their work forces  
6 to ensure that those conducting examinations are  
7 doing so in accordance with the rule's requirements.

8           Again, for any of this to take place, the  
9 terms of the rule must be known.

10           For these reasons, we agree the effective  
11 date should be delayed, but the effective date of the  
12 final rule should be indefinitely suspended. An  
13 effective date should only be established once the  
14 substantive terms of the final rule are finalized and  
15 not before the amended final rule is promulgated and  
16 the litigation in the 11th Circuit is resolved.

17           Thank you again for this opportunity to  
18 provide the testimony.

19           MS. FONTAINE: Is there anyone else who  
20 wishes to make a presentation?

21           Okay. We are going to take a 15-minute  
22 break right now. Thank you.

23           (Break taken.)

24           MS. FONTAINE: Going back on the record.

25           Okay. So there doesn't seem to be anyone

1 else here who wants to make any presentations, so I'm  
2 going to thank everyone for coming forward and making  
3 the presentation they did. I also thank everyone  
4 else who attended the hearing.

5 I want to emphasize that we need your  
6 comments by Monday, November 13th. We will take all  
7 of your comments and concerns into consideration when  
8 we develop the final rule. I continue to encourage  
9 you to participate and provide your input during the  
10 rulemaking process.

11 Before this hearing concludes, I would  
12 also like to mention MSHA's upcoming regulatory  
13 reform initiative, Executive Order 13777, Enforcing  
14 the Regulatory Reform Agenda. It directs each  
15 federal agency to evaluate existing regulations and  
16 make recommendations regarding their repeal,  
17 replacement or modification, consistent with  
18 applicable law.

19 To comply with this executive order, we  
20 will seek stakeholder input to assist MSHA in  
21 identifying and evaluating existing regulations that  
22 could potentially be removed, revised or streamlined,  
23 while not reducing protections for miners. MSHA  
24 considers early public participation in the regulatory  
25 reform process to be particularly important for the

1 mining community to present their views and  
2 recommendations, information and data, including  
3 economic and technological feasibility concerns.  
4 Therefore, under the heading SPOTLIGHT on MSHA's main  
5 web page, we have included a link to an e-mail  
6 address where stakeholders can submit their comments  
7 on reform of MSHA's regulations. That address is  
8 zzMSHA-OSRVRegulatoryReform@dol.gov.

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

17 At this time, I want to thank you very  
18 much. We have been off of the record for, like, 15  
19 minutes, and since there appears to be no one else  
20 who wants to speak, our public hearing is concluded,  
21 but you can continue to submit your written comments.

22 Thank you.

23 (The hearing concluded at 9:59 a.m.)

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REPORTER'S HEARING CERTIFICATE

STATE OF UTAH                    )  
  )  ss.  
COUNTY OF SALT LAKE        )

I, Dawn M. Perry, Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify:

That said proceeding was taken down by me in stenotype on October 26, 2017, at the place therein named, and was thereafter transcribed, and that a true and correct transcription of said proceedings is set forth in the preceding pages;

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND this 31st day of October, 2017.



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Dawn M. Perry, CSR