

**Additional Comments of Murray Energy Corporation
on MSHA's Proposed Rule on Lowering Miners' Exposure to Respirable
Coal Dust, Including Continuous Personal Dust Monitors: RIN 1219-AB64**

Murray Energy Corporation ("Murray Energy") is the largest privately-owned coal company in America, producing approximately 30 million tons of bituminous coal annually that provides affordable energy to households and businesses across the country. Murray Energy's subsidiaries operate eight underground and surface mining operations in Southern Illinois and Southern Ohio, Western Kentucky, and Utah, plus 40 subsidiary and support companies. Transporting coal via truck, rail, and waterways, Murray Energy operates the second-largest fleet of longwall mining units in the country. With a support team of 2,800 hard-working, dedicated, and talented employees, MEC's affordable high-quality coal is mined safely and efficiently, and is supplied to leading producers of electricity, both domestically and abroad. Murray Energy's committed management team and workforce are dedicated to maintaining a safe work environment.

Murray Energy wishes to state at the outset that we believe that the current rules of MSHA and the National Institute for Occupational Safety and Health ("NIOSH"), designed to prevent coal workers' pneumoconiosis ("CWP") are badly in need of reform, based on experience gained under the implementation of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 801, et seq., (the "Mine Act") and other health and safety laws. Murray Energy supports such reform, but after careful review and consideration of this Notice of Proposed Rulemaking ("NPR"), we have concluded that it is totally unacceptable. Murray Energy, therefore, rejects this NPR and urges that MSHA withdraw it entirely and start afresh.

Murray Energy believes that MSHA has neither satisfied the Agency's procedural obligations nor its substantive duties under the Mine Act, other laws, and executive branch

policies that are necessary to sustain this NPR. With particular regard to the Mine Act, three provisions are central to the validity of the NPR. These provisions are §§ 202(a), 202(f), and 101(a)(6)(A). As we now demonstrate, MSHA has utterly failed to carry out its statutory obligations under each of these provisions.

- Mine Act § 202(a) requires both the Secretary of Labor and the Secretary of Health and Human Services to prescribe in the Federal Register the methods, locations, intervals, and manner in which to take accurate samples of respirable dust in the mine atmosphere to which each miner in the active workings of underground coal mines is exposed. This NPR purports to prescribe the methods, locations, intervals, and manner in which to take samples of respirable dust, but it is fatally defective in that the Secretary of Health and Human Service's involvement in these prescriptions is nowhere to be found. Any rule that MSHA publishes in the Federal Register dealing with these issues *must be both proposed and promulgated jointly* by both the Secretary of Labor (through her delegate MSHA, if she so chooses) and by the Secretary of Health and Human Services (through her delegate NIOSH, if she so chooses). Under Mine Act § 202(a), MSHA simply does not have the statutory authority to independently publish proposed or final rules dealing with the above-specified issues. Indeed, even if NIOSH were to approve of such provisions, that would not correct the problem because Mine Act § 202(a) specifically insists on joint publication in the Federal Register throughout the rulemaking process, from initial proposal to final promulgation.

- Not only is the NPR fatally flawed procedurally due to MSHA's failure to include the Secretary of Health and Human Services in the development and publication of the NPR, but also MSHA runs afoul of the substantive mandate of Mine Act §202(a) with regard to the accuracy of the samples proposed to be taken. Thus, as the testimony of the NMA witnesses at

the MSHA February 15, 2011 public hearing effectively demonstrated, the new continuous personal dust monitor (“CPDM”) which, after a short period of time under the NPR, would be the mandatory sampling device for respirable dust, needs additional development and improvement to provide accurate results. Murray Energy, of course, endorses the expert report of Michael Cooper, MPH, CIH, and Sheila McCarthy, MPH, CIH on “Laboratory Testing of Continuous Personal Dust Monitor (CPDM),” prepared for MEC, Alliance, Arch, the Illinois Coal Association, and the Indiana Coal Council. This report is included as part of Murray Energy’s comments. In light of the above noted testimony and expert report, it is the strongly considered view of Murray Energy that while in due course it is possible that the CPDM may be sufficiently perfected to take accurate samples -- that time has not yet arrived. In short, for the present time Murray Energy believes the CPDM should only be used as an administrative control to allow mine operators to monitor the exposures of their miners to respirable dust, pending the successful completion of rigorous field trials of the CPDM, pursuant to a protocol developed by all stakeholders. The CPDM should not be used, in its present state of development, as a device to determine compliance with the respirable dust standard.

- On a similar note, Mine Act § 202(f) demands, with regard to the term “average concentration” of respirable dust in the mine atmosphere during each shift to which each miner in the active workings in the mine is exposed, that such average concentration must be measured for an eighteen month period following the enactment of the Mine Act, over a number of continuous production shifts, *as determined by the Secretary of Labor and the Secretary of Health and Human Services*, but following that eighteen month period, over a single shift only, unless the two secretaries find, in accordance with Mine Act § 101, that such single shift measurement will not, after applying valid statistical techniques, accurately represent such

atmospheric conditions during such shift. As the preamble of the NPR correctly points out, the predecessors to the two Secretaries found in 1972 (and so published their finding in the Federal Register) that single shift measurement of respirable dust would not, after applying valid statistical techniques, accurately represent such atmospheric conditions during such shift.¹ That joint Secretarial finding remains in effect today, although in this NPR, MSHA “proposes to rescind the 1972 joint notice of finding.”² MSHA knows it does not have the authority to rescind this finding unilaterally. The Agency, therefore, falls back on some slight-of-hand, claiming that a July 2000 joint MSHA-NIOSH proposal to rescind the 1972 finding is still subject to public comment.³ Murray Energy doubts that the rationale for an eleven-year-old proposed joint rescission of the 1972 finding can be fresh enough to serve much use in support of this NPR, which is such a radical departure from earlier proposals. However, no matter what regulatory magic trick is used, at the end of the day, there can be no revocation of the 1972 joint Secretarial finding without a *proposed rescission published by both MSHA and NIOSH for comment and a joint final rescission then following*. In this NPR, no such role for NIOSH or the Secretary of Health and Human Services can be found, and the NPR is thus fatally flawed on that count too.

- Finally, Murray Energy believes that MSHA has not successfully fulfilled its burden, under Mine Act § 101(a)(6)(A), to demonstrate the need for revisions to the respirable dust standards based on the best available evidence. For that reason too, this NPR is fatally flawed. Among the reasons why the Companies reject this NPR, and central to our view that MSHA has

¹ See 75 Fed. Reg. 64,413 referencing a joint finding by the Secretaries of the Interior and Health, Education, and Welfare under section 202(f) of the Federal Coal Mine Safety and Health Act of 1969, published on February 23, 1972, at 37 Fed. Reg. 3,833.

² *Id.* at 64,449.

³ *Id.* at 64,415.

not demonstrated that the NPR is based on the best available evidence, is that we vehemently disagree with MSHA that the prevalence of CWP is increasing in the Nation's coal miner population. *See* "Comments Specific to: Industrial Hygiene and Medical Surveillance Issues," prepared by Michael N. Cooper, MPH, CIH, and Sheila McCarthy, MHS, CIH. *See also*, "Specific Comments on the MSHA Review of Medical Monitoring and Epidemiologic Studies," prepared by Michael Kelsh, PhD, MPH and Martha L. Doembard, PhD, MS. Both of these reports are included in Murray Energy's comments. We also call your attention to "A Critical Review of the Scientific Basis for MSHA's Proposal for Lowering the Coal Mine Dust Standard," prepared by John F. Gamble, PhD, Robert B. Reger, PhD, and Robert E. Glenn, MPH, filed separately on behalf of Murray Energy, Alliance Coal, Alpha Natural Resources, Arch Coal, BHP Billiton New Mexico Coal, and Peabody Energy. In addition, and very importantly, Murray Energy urges MSHA to pay especially close attention to a new study published online by NIOSH scientists on May 19, 2011, entitled "Coal Workers' Pneumoconiosis in the United States: Regional Differences 40 Years After Implementation of the 1969 Federal Coal Mine Health and Safety Act."⁴ This important new NIOSH study is quite consistent with and supportive of the aforementioned reports of Mr. Cooper, Ms. McCarthy, Drs. Kelsh and Doembard, and Drs. Gamble, Reger, and Mr. Glenn. To best understand the implications of this new NIOSH study, we We refer MSHA to the critical review of the study prepared by Mr. Glenn, also filed separately on behalf of Murray Energy, Alliance Coal, Alpha

⁴ Suarathana E., Laney AS, Storey E., et al., *Occup. Environ. Med.*, published online, May 19, 2011.

Natural Resources, Arch Coal, BHP Billiton New Mexico Coal, and Peabody Energy.⁵ In connection with all of these reports and the new NIOSH study, Murray Energy wishes to point out that Mine Act §101(a)(6)(A) requires, *inter alia*, that in connection with the NRP, MSHA must consider the “latest available scientific data in the field.”⁶

Murray Energy also must point out to MSHA that in its desire to establish a 1.0 mg/m³ respirable dust standard the agency is required to take into account that this level is substantially lower than all other comparable limits for respirable dust on a world-wide basis, according to no less an authority than the 1995 NIOSH Criteria Document for Occupational Exposure to Respirable Coal Mine Dust (the “Criteria Document”).⁷ While it is true that NIOSH recommended a 1.0 mg/m³ in the Criteria Document, in so doing NIOSH recognized that the existing OSHA limit for respirable dust was 2.0 mg/m³, and that the same standard was identified as the Threshold Limit Value (“TLV”) by the American Conference of Governmental Industrial Hygienists (“ACGIH”).⁸ In addition, the Criteria Document recognized that virtually every other country in the world had substantially higher limits for respirable coal mine dust than the limits in the United States, including Australia (3.0 mg/m³), Germany (4.0 mg/m³), and the United Kingdom (3.8 mg/m³). Furthermore, the Criteria Document recognized that the United Nations’ World Health Organization (“WHO”) had recommended a tentative health-based exposure limit for respirable coal mine dust ranging from 0.5 to 4.0 mg/m³, and that this limit would be based

⁵ Glenn, RE, A Critical Review of the Paper “A Critical Review of the Paper “Coal Workers’ Pneumoconiosis in the United States: Regional Differences 40 Years after the 1969 Federal Coal Mine Health and Safety Act of 1969,” Surthana, et al.

⁶ 30 U.S.C. §811(a)(6)(A).

⁷ NIOSH (1995), Criteria for a Recommended Standard—Occupational Exposure to Coal Mine Dust, Public Health Service, CDC, DHHS (NIOSH) Publication No. 95-106.

⁸ Criteria Document at 12.

upon variables including the “risk factors (*i.e.*, coal rank or carbon content, proportion of respirable quartz and other minerals, and particle size distribution of the coal dust) . . . that are determined at each mine”⁹

Murray Energy believes that Mine Act §101(a)(6)(A), which requires MSHA in this NPR to consider experience gained under health and safety laws other than the Mine Act, includes the laws under which the aforementioned limits were established. Therefore, MSHA must, under Mine Act § 101(a)(6)(A), address this issue head-on by explaining why, in the face of these other legally mandated standards, its proposed new 1.0 mg/m³ is justified.

In short, Murray Energy submits that the above discussion categorically demonstrates that MSHA has failed to meet its obligations under the provisions of Mine Act §§ 202(a), 202(f), and 101(a)(6)(A). For these reasons, this NPR should be withdrawn.

In addition to the above, Murray Energy also wishes to comment on:

- the periodic examination provisions of proposed § 72.100;
- MSHA’s confusing and inconsistent requirements regarding the use of airstream helmets and other suitable respirators as supplemental controls to protect coal miners from respirable coal mine dust;
- the feasibility of the NPR; and,
- MSHA’s failure to adequately consider a number of Presidential Executive Orders and related materials.

In addition to the control of respirable coal mine dust (“CMD”) as coal is mined, medical surveillance and periodic medical examinations of coal miners are an essential component of efforts to prevent CWP. In that respect, the new provisions contained in §72.100 of Subpart B, Medical Surveillance, Periodic Examinations (75 Fed. Reg. 64,497) and the rationale in the

⁹ *Id.* at 12.

Section-by-Section discussion of the Preamble (*id.* at 64,444-64,445) are a step in the right direction. However, many more steps should be taken. Thus, we recommend that this section be closely examined by the Agency and that coordination with NIOSH be undertaken to ensure that the provisions of 42 C.F.R. Part 37, the long-standing NIOSH regulations setting forth “Specifications for Medical Examinations for Underground Coal Miners,”¹⁰ are revised to make certain that they work in a seamless manner with the provisions of § 72.100. We have found a number of instances where confusion between Part 37 and § 72.100, as proposed, are almost certain to occur. In addition, we strongly urge that § 72.100 could be greatly improved with the inclusion of fundamental public and occupational health principles regarding occupational medical surveillance. Building these principles into this section will provide coal miners with greater protection from CMD exposure.

We are pleased to see that MSHA is extending the periodic examinations to miners at surface coal mines. Some surface miners are potentially overexposed to CMD concentrations and will benefit from inclusion in a medical surveillance program aimed at early detection and intervention for CMD-related diseases. As stated above, however, MSHA also should improve proposed § 72.100 for all coal miners—both surface and underground. We, therefore, urge the Agency to redraft § 72.100 to afford both underground and surface coal miners equally with the protections of the basic occupational health practices used in modern day occupational medical surveillance programs.

¹⁰ 42 C.F.R. Part 37 was promulgated pursuant to the authority of the Secretary of Health and Human Services under § 203 of the Federal Mine Safety and Health Act of 1977, as amended (the “Mine Act”).

The existing periodic examination program, operated for decades as the NIOSH Coal Workers' X-ray Surveillance Program ("CWXSP"), under NIOSH's regulations in 42 C.F.R. Part 37, has been a disappointment and failure as a secondary prevention program, primarily due to poor participation by eligible coal miners and the failure of miners eligible for transfer to a less dusty job to avail themselves of the option to transfer to a less dusty area of the mine.¹¹

The objective of the secondary prevention feature of the CWXSP is the early detection and transfer of miners with abnormal chest X-ray findings to areas of lower CMD exposure, thereby preventing the progression of coal workers' pneumoconiosis ("CWP") to a more serious disease state, Progressive Massive Fibrosis ("PMF"), with associated disabling pulmonary function loss. Both of these flaws can be corrected through redrafting of proposed §72.100 per our recommendations below.

Under the NPR, medical examinations are mandatory under three circumstances. First, when a miner begins work at a coal mine for the first time an initial examination is to be conducted within the first 30 days of employment. Proposed § 72.100(c)(1). 75 Fed. Reg. 64,497. Second, a follow-up examination is mandatory not later than three years after the initial examination. Proposed § 72.100(c)(2). *Id.* Then, if the three-year mandatory examination shows evidence of pneumoconiosis or evidence of decreased lung function, under proposed § 72.100(c)(3), an additional examination is mandatory no later than two years after the three-year examination. *Id.* After the mandatory examinations the operator is to provide the

¹¹ By secondary prevention we mean measures that include medical screening for the early detection of diseases and medical intervention, which is aimed at reversing or impeding progression of disease. On the other hand, primary prevention of work-related disease depends on the effective control of worker exposures below occupational exposure limits.

opportunity for miners to have a voluntary examination at least every five years. *See* proposed § 72.100(b). *Id.*

The medical examinations afforded coal miners are authorized in § 203 of the Mine Act (derived from § 203 of the Federal Coal Mine Health and Safety Act of 1969). The current NIOSH mandatory provisions for initial, follow-up, and voluntary periodic examinations contained in 43 C.F.R. Part 37 were promulgated pursuant to the authority of Mine Act § 203, most recently in 1978. 43 Fed. Reg. 33,715 (Aug. 1, 1978). Because Mine Act § 203 is an interim mandatory health standard, Mine Act § 201(a) authorizes these regulations to be superseded in whole or in part by improved mandatory health standards promulgated under the rulemaking procedures of Mine Act § 101. *After forty years of experience in declining miner participation in the CWXSP it should be obvious to all involved that voluntary participation is not working.* Even at the outset of the CWXSP the highest participation rate ever obtained was only 50% and it has steadily declined since then.

Under any circumstances, we urge MSHA to work with NIOSH to eliminate any duplication or overlap between § 72.100 and Part 37. *See, e.g.,* 42 C.F.R. § 37.3, “Chest roentgenograms required for miners.” Furthermore, and most urgently, to accomplish the objectives of the program it is imperative that the periodic examinations, like the initial and follow-up examination(s), be made mandatory. The final rule should make periodic examinations mandatory for all underground and surface coal miners.

Similarly, the transfer provisions for miners with evidence of CWP under 30 C.F.R. Part 90, like the CWXSP, has been a failure. It should be reformed with the promulgation of new rules. The failure of the early intervention program to persuade miners to avail themselves of the transfer option to a less dusty environment is illustrated in Table 1 below, taken from the NIOSH

website.¹² As seen in the Table, since 1980, the year in which transfer data began to be electronically tracked, 3,269 miners have received a letter notifying them of their right to exercise the transfer option but only 608 (19%) have exercised their option to transfer. Thus, the intervention strategy to reduce miners' exposure through transfer to areas of lower dust exposure has failed because of miners turning down their option to transfer.

Table 1			
Part 90 Transfer Rates for the Coal Workers' X-Ray Surveillance Program			
Time Period[1]	Number of Miners notified of eligibility of transfer[2],[3]	Number of Miners who exercised their transfer rights[4]	Transfer Rate
1980-1984	1606	327	20
1985-1989	506	84	17
1990-1994	397	73	18
1995-1999	200	43	21
2000- Sept 2003	560	81	14

1. Prior to 1980, the transfer data was not electronically tracked.
2. If a miner received more than one letter, they were only included in the time period when the first letter was mailed.
3. Data provided by the NIOSH Underground Coal Mine System
4. Data provided by MSHA Part 90 Mining Tracking System

For the intervention program to be effective in preventing pulmonary function loss, stronger measures must be put in place to increase the participation in the transfer option. The current 2.0 mg/m³ coal mine dust standard was derived from British research, which provided the only quantitative exposure-response relationship available at that time. This exposure-response curve predicted that no cases of CWP as severe as category 2 on the ILO classification system

¹² www.niosh.gov .
<http://www.cdc.gov/niosh/topics/surveillance/ords/CoalMineHealthSafetyAct35Years.html>.

would develop among miners who worked for 35 years at 2.0 mg/m³. Similarly at that time, the current information indicated that PMF, the disabling form of CWP, was very unlikely to develop from less severe ILO categories (e.g., category 1 CWP). Therefore, adoption of the 2.0 mg/m³ limit was believed, at that time, to be protective against the risk of disability and premature mortality that accompanies PMF. Thus, if a miner is found to have radiographic changes on a periodic examination consistent with Category 1 (ILO Classification) the miner should be encouraged to exercise the option to transfer. However, because there is a greater probability for miners reaching Category 2 to develop PMF, in the case of miners with a classification \geq Category 2, Murray Energy believes that transfer to a less dusty job should be mandatory.

The NIOSH rules in 42 C.F.R. Part 37 have been interpreted to prevent mine operators, or the operators' health professional designees from having access to miners' X-rays or their results, even though it is the operators who are required to have a plan approved by NIOSH for conducting examinations and to pay for such examinations. Murray Energy strongly urges that MSHA should avoid that outcome in any new rules by affirmatively providing for the results of the § 72.100 examinations to be made available to a health professional designated by the operator.

We say this because:

- First, there is nothing in Mine Act § 203 or its legislative history that supports this exclusory practice;
- Second, Mine Act § 103(h) provides “[e]xcept to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to this Act may be published from time to time, may be released to any interested person, and shall be made available for public inspection”; and,
- Third, important information regarding occupational illness identified by these examinations could be used to provide health counseling and medical management of miners showing evidence of early disease.

To our knowledge, unless this issue is dealt with squarely and affirmatively, the examinations proposed in § 72.100 would be the only occupational medical program mandated by the Department of Labor that prevents the employer from using such information to benefit the worker.

It is crucial that MSHA conform to the accepted principles of occupational health practice, and the guidance of other federal regulatory and health agencies, by allowing coal mine operators to have access to pertinent occupational health findings for their workforce.¹³ It is the mine operator who has a duty to prevent the development of occupational illnesses in miners that would impair health or result in premature mortality. We implore MSHA to correct this long overdue disparity in dealing with notification of results of medical examinations as compared to its sister DOL Agency – OSHA.

We are also very concerned that in proposed § 72.100, MSHA has failed to take into account the effects of smoking among coal miners. It is well known, and even a recognized

¹³ As we discussed earlier, Mine Act § 101(a)(6)(A) requires that MSHA consider experience gained under other safety and health laws.

factor in many of the health studies MSHA cites in its NPR, that the combination of CMD exposure and smoking are additive and increase the prevalence and severity of chronic obstructive pulmonary disease (“COPD”). Silica exposure and smoking seem to have a similar effect on COPD as that of coal mine dust. Yet despite this knowledge and the known toll that smoking takes on the American people, MSHA fails to address this important public health topic in its proposal. MSHA ignores the recommendation of NIOSH that smoking be prohibited in all underground and surface mines and all other work areas associated with coal mining.¹⁴ NIOSH is quite specific in its recommendation contained in the Criteria Document regarding prohibition of smoking, stating.

NIOSH recommends that the mine operator prohibit smoking and strictly enforce this policy in all underground and surface coal mines and in all other work areas associated with coal mining. The mine operator or the physician should counsel tobacco-smoking miners about their increased risk of developing lung cancer and COPD; the mine operator or physician should also counsel such miners to participate in a smoking cessation program.

We further note that MSHA proposes to add occupational history and symptom assessment questionnaires to the medical examinations given coal miners. We agree these questionnaires should be added. However, the proposal does not specifically address adding a smoking history questionnaire to the examination. We further note that NIOSH fails to collect any information regarding smoking in its occupational history questionnaire form for the CWXSP.¹⁵ This aberrant omission needs to be corrected in any final rule. A smoking history questionnaire should be mandated.

¹⁴ Criteria Document at 96.

¹⁵ See Criteria Document at 300-301.

Further, with regard to the principle that this section and 42 C.F.R. Part 37 should not duplicate or overlap with one another, we are puzzled by the statement in proposed § 72.100(c)(3), that for the purposes of that follow-up examination, if the chest x-ray shows evidence of pneumoconiosis or the spirometry examination indicates evidence of decreased lung function, then “[f]or this purpose, evidential criteria will be defined by NIOSH.” 75 Fed. Reg. 64,497. Nothing in the preamble explains this phrase (*id.* at 64,445). Of course, the existing Part 37 does not include spirometry and, thus, there are no specified criteria for conducting spirometric examinations. Consequently, and again to reconcile Part 37 with proposed § 72.100, MSHA should ask NIOSH to publish, as a proposed rule, the evidential criteria mentioned here so that interested persons will have the opportunity to comment on them. Such NIOSH rulemaking should be carried out pursuant to the rulemaking provisions of the Mine Act, and should be finalized no later than the effective date of § 72.100, whenever it is promulgated.

In addition, MSHA’s proposed § 72.100(d) demanding that operators develop and submit to NIOSH for approval a plan for providing miners with the specified examinations is confusing. What will be the content of the plan? Is this the same plan as is specified in 42 C.F.R. §§37.3 and 37.4? If so, when finalized, § 72.100(d) should clearly state this to be the case. In any event, since proposed § 72.100 is designated as a mandatory health standard for all coal mines, violations of this provision, including § 72.100(d), will be subject to the full range of Mine Act enforcement and penalty provisions. Mine operators and miners, as well as MSHA’s inspectorate must have a full and clear understanding of what this proposed plan requires.

In summary, this proposed § 72.100 falls unacceptably short of being based on sound occupational health practice and is unclear and confusing in terms of its relationship to the NIOSH rules in 42 C.F.R. Part 37. It is, therefore, doomed to repeat past failures, and will

ultimately fail as a secondary prevention program aimed at early detection of disease and intervention to minimize progression to more serious disease outcomes. This is easily corrected by mandating miner participation in initial and periodic medical examinations, by urging miners with evidence of $\geq 1/0$ small opacity profusion to transfer to lower dust, by requiring miners with evidence of $\geq 2/0$ to transfer to lower dust, and by ensuring that this section and Part 37 mesh effectively with one another.

**Comments on MSHA's Confusing and Inconsistent Requirements
Regarding the Use of Airstream Helmets and Other Suitable Respirators
as Supplemental Controls to Protect Miners from Respirable Coal Mine Dust**

Murray Energy firmly believes that any revision to MSHA's rules for the control of respirable coal mine dust to protect coal miners must clearly allow operators to apply the well-established industrial hygiene precepts known as the hierarchy of controls, that is to--

- require the application of all feasible engineering or environmental controls to achieve the applicable coal mine respirable dust standard;
- if such feasible engineering or environmental controls cannot achieve the standard, then apply all feasible administrative controls, including rotation of miners from one working position to another; and,
- finally, if all feasible engineering, environmental, and administrative controls cannot achieve the standard, then suitable respirators, such as airstream helmets or other NIOSH-approved powered-air purifying respirators ("PAPRs"), or other suitably protective NIOSH-approved respirators may be used as a supplement to achieve the standard.¹⁶

MSHA's current respirable coal mine dust regulations do not recognize the hierarchy of controls. They defer entirely to the interim mandatory health standard provided for in Mine Act § 202(h) which states, in applicable part, "Use of respirators *shall not be substituted* for environmental control measures in the active workings [of underground coal mines]." (Emphasis

¹⁶ All of these steps in the hierarchy of controls need not be applied all the time. Rather they are to be applied sequentially until compliance with the applicable standard is achieved.

added.) That provision of the Mine Act is codified in the current rules at 30 C.F.R. § 70.300. Such a provision is also included in this NPR at proposed § 72.700(a).¹⁷

The NPR, however, also proposes, in § 70.208(h), to allow, during the initial 24-month effective period of the proposed rules, the “use of supplementary controls” for a period not to exceed six months, if the operator determines that “all feasible engineering or environmental controls are being used” and the operator’s request is approved by the MSHA District Manger “through the approval process associated with the mine ventilation plan.”¹⁸ But this provision does not specify that such supplementary controls can include respirators, nor does the preamble explanation of this provision shed any light on the question of whether or not respirators are considered to be supplementary controls.¹⁹ Furthermore, in proposed §§ 70.207(i) and 70.209 (e), during the time fixed for abatement of a citation of the applicable respirable dust standard, operators shall “[m]ake approved respiratory equipment available to affected miners in accordance with [proposed] § 72.200.”²⁰

We conclude, therefore, that the NPR does not allow for suitable respirators to be used as a “supplementary control” under proposed § 70.208(h). We conclude further that after a citation is issued for violation of the applicable respirable dust standard, it is only then that *availability (but not necessarily use) of respirators can serve as part of the means of abating the citation.*

¹⁷ 75 Fed. Reg. 64,498.

¹⁸ *Id.* 64,490.

¹⁹ *Id.* at 64,435.

²⁰ *Id.* at 64,489 and 64,490.

Murray Energy is terribly disappointed with these excessively restrictive proposals. MSHA's failure to explain why the use of respirators like airstream helmets cannot even be considered to be a temporary supplementary control is, in our view, a huge step backward.

We say this because Mine Act § 202(h) is an *interim* mandatory health standard under the Mine Act which can be revised under the rulemaking provisions of Mine Act § 101.²¹ We submit that allowing operators to apply the hierarchy of controls, including the use of airstream helmets, other NIOSH-approved PAPRs, or other suitably protective NIOSH-approved respirators does not operate to allow these respirators to be used as "substitutes" for engineering or environmental controls, but only as supplementary controls. *As we understand it, proper application of the hierarchy of controls would demand the sequential use of all feasible controls—engineering, environmental, administrative, and suitable NIOSH-approved respirator, as and when necessary to achieve compliance with the applicable respirable coal mine dust standard.*

In addition, even under the current provisions of Part 70, we understand MSHA's longstanding policy has been that respirators should be used in underground coal mines as an interim method of protection until feasible engineering or environmental controls are available. We also submit that allowing mine operators to properly apply the hierarchy of controls is the best way to fully protect coal miners against respirable coal mine dust, especially in mines operating on a reduced respirable dust standard due to the quartz content of the coal mine dust. MSHA should adopt this approach in any new rule the Agency ultimately promulgates with respect to improved protection of coal miners from respirable dust.

²¹ See Mine Act § 201(a).

To reiterate and reemphasize our concerns about MSHA's confusing and inconsistent pronouncements and provisions in the NPR on the use of PAPRs and other suitable respirators as MSHA has ignored the issue in spite of earlier laudable efforts by the two previous Administrations to come to grips with it.²² Murray Energy submits that sweeping the problem under the rug is the worst way to deal with what the two previous Administrations recognized was a severe problem, especially in mines using longwall technology and or dealing with a reduced respirable dust standard due to the presence of quartz. As we said at the outset of this portion of our comments, the best way for MSHA to come to grips with this issue is to simply permit operators to apply the well-accepted and hierarchy of controls. The time has come for MSHA to emerge from under the shadow of the outmoded interim health standard set out in Mine Act § 202(h) and to join the rest of the international industrial hygiene community.²³

MSHA's failure to do so will result in one more reason (and a major one) demonstrating that compliance with the NPR is not feasible—and it is to that topic that we now turn.

²² See 65 Fed. Reg. 42,134-42,138, 42,140,42,141, 42,146-42, 148, 42,164, and 42,180-42,182 for discussion of the issue during the Clinton Administration. See also, 68 Fed. Reg. 10,785-10,786.

²³ Murray Energy notes that in MSHA's limit on exposure of underground metal/nonmetal miners to diesel particulate matter ("DPM"), at 30 C.F.R. §57.5060, subsection (d) of that mandatory standard provides that when feasible engineering and administrative controls do not reduce a miner's exposure to the DPM limit, or controls do not produce significant reductions in DPM exposure, then those controls must be used to reduce the miner's exposure to as low a level as feasible and, then, must be supplemented with suitable respiratory equipment. We urge MSHA to recognize that since the Agency has adopted the application of the hierarchy of controls for the protection of underground metal/nonmetal miners from DPM, then it would not only be consistent, but would also represent sound occupational health policy to allow the use of the hierarchy of controls to protect coal miners from respirable coal mine dust. The "as low as feasible" concept can also be found in the United Kingdom's "Coal Mines (Control of Inhalable Dust) Regulations, 2007," in which the use of suitable respirators is permitted in addition to engineering or administrative controls. See Regulation 5.

Feasibility of the NPR

When MSHA promulgates standards such as those contained in the NPR, Mine Act § 101(a)(6)(A) requires those standards to be feasible. The importance of feasibility was emphasized in *National Mining Association v. Secretary of Labor*, 153 F.3d 1264 (11th Cir. 1998), which held that “MSHA shall consider feasibility. The language is not discretionary.” *Id.* 1268. We have read the discussion of feasibility in the preamble of the NPR with care and are gravely disappointed that the Agency treated the issue in such a cursory fashion.²⁴ The entire discussion of the feasibility issue takes up two columns plus six additional lines of text (less than one page) in a preamble that comprises a total of 72 pages of the Federal Register. That cursory treatment of both technological *and* economic feasibility simply fails any reasonable notion of a discharge of MSHA’s duty to consider feasibility.

As far as economic feasibility is concerned, the report of Dr. Robin Cantor, “Comments on the MSHA Preliminary Regulatory Economic Analysis for the Coal Mine Dust Rule,” which is a separate attachment to these comments, shows the error of MSHA’s conclusion “that compliance with the provisions of the proposed rule would be economically feasible for the industry.”²⁵

With regard to technological feasibility, we (and other coal mine operators) have been using all available feasible engineering controls for years to achieve compliance with the current 2.0 mg/m³ standard. No new, miracle engineering technology exists or can be found in the research cupboard which will allow mine operators to generally comply with the proposed new 1.0 mg/m³ standard. Indeed, as MSHA itself has recognized, in order to reduce respirable dust

²⁴ 75 Fed. Reg. 64,476-64,477.

²⁵ *Id.* 64,477.

levels, there are only so many engineering controls available to either reduce dust generation, or suppress, dilute, capture, or divert it.²⁶

In its preamble discussion of technological feasibility, the agency proffers three reasons why it believes the proposed rules are technologically feasible. We respond to each of these below.

- *The Agency asserts that both MSHA and mine operator data show that “the majority of miners’ exposures are [already] at or below the [respirable coal mine dust] limits in the proposed rule.”²⁷*

We do not agree with MSHA’s claim. Indeed, compelling evidence was presented by Alliance Coal engineering representatives, as part of the NMA panel presentation at the February 15, 2011 MSHA public hearing that the vast majority of mines cannot meet the proposed 1.0 mg/m³ limit on a single shift sampling basis at any single mine over any substantial period of time. In other words, mines may be able to meet the proposed limit some of the time, but will not be able to meet the new standard all of the time, which, of course is what the NPR would demand.²⁸

- *(2) MSHA also has said it has “. . . included a 24-month phase-in period to allow mine operators time [to identify, develop, and implement feasible engineering controls] to come into compliance.”²⁹*

That phase-in period is well and good, but as we noted above, the Agency itself has recognized that there are only so many engineering controls available to either reduce dust

²⁶ 65 Fed. Reg. 42,134 (Jul. 7, 2000).

²⁷ 75 Fed. Reg. 64,477.

²⁸ See testimony of Alliance’s Mark Watson and Heath Lovell at the February 15, 2011 MSHA public hearing.

²⁹ *Id.*

generation (e.g., machine parameters), suppress dust (e.g., water sprays, wetting agents, foams, water infusion, etc.), dilute dust (e.g., ventilation), capture dust (e.g., dust collectors), or divert respirable dust (e.g., shearer clearer, passive barriers, etc.).³⁰ We apply all of these engineering controls, as appropriate, at our mines. However, as long as MSHA refuses to permit the full use of the hierarchy of controls, then the Agency's refusal to allow the use of suitable respiratory protection as a supplement to the toolbox of engineering controls will remain a huge impediment to lowering the exposures of miners to respirable coal mine dust.

- (3) *The 24-month phase in period would also allow enough time to produce and deploy a sufficient number of CPDMs for use in measuring for compliance with the new limits on respirable coal mine dust.*
Simply put, the CPDM

(while showing promise for the future) is not now ready for use as a day-to-day, shift-to-shift compliance tool.³¹ Even the manufacturer of the CPDM recognizes that many details of how the device will be used remain to be worked out.³²

In addition, Murray Energy must tell MSHA, in no uncertain terms, that the NPR is structured such that, if enforced as written, it will throw the industry into such disarray that this consequence, *per se*, demonstrates the infeasibility of the NPR.

By way of example, at the MSHA public hearing of February 15, Alliance Coal engineers Mark Watson and Heath Lovell (testifying for NMA) stated that their calculations showed that, as opposed to less than 200 citations per year for violations of the current 2.0 mg/m³ respirable dust limit, *imposition of a 1.0 mg/m³ limit (based on a single, full-shift measurement) could*

³⁰ 65 Fed. Reg. 42,134 (Jul. 7, 2000).

³¹ See, "Laboratory Testing of Continuous Personal Dust Monitor (CPDM)," prepared by Michael Cooper, CIH, and Shiela McCarthy, CIH, attached to the comments.

³² See Kris Maher, *New Monitor Kicks Up a Dust Storm*, Wall St. J., May 3, 2011 at B6.

result in more than 230,000 citations annually. Because all of these are alleged violations of mandatory health standards, under Mine Act jurisprudence, each of them would be treated as “significant and substantial” unless the operator could show there was no health effect, a very high bar to cross.

Furthermore, in connection with each citation for an alleged violation of the 1.0 mg/m³ limit, we must assume, if the NPR were to be enforced as written, that revisions to the approved CPDM performance plan, proposed in new §70.206 would be required.³³ MSHA does not have the number of skilled personnel to deal with the possibility of more than 230,000 revisions to the CPDM performance plan annually. We remind MSHA that if an operator does not have an approved plan, then it is highly likely for the mine in question to be idled pending such approval.

We also must remind MSHA of the centrality of “significant and substantial” violations to the Agency’s proposed rule on “Patterns of Violations.”³⁴ If over 230,000 “significant and substantial” violations annually result from this NPR, we are gravely concerned that it will be extraordinarily difficult to avoid having our mines fall into the pattern of violations enforcement mechanism—and that our mines may never emerge from the “patterns” sanction.

Murray Energy is very concerned as well that the MSHA proposed rules on “Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards,”³⁵ will, if promulgated as proposed, cause further disarray, not just for

³³ 75. Fed. Reg. 64,487-64,488. See especially, proposed §§70.206 (a) and (d) stating that the purpose of the plan is “to ensure that no miner working on an MMU shall be exposed to concentrations of respirable dust in excess of the applicable standard” and that the MSHA district manager may require the plan to be revised if he determines the plan is inadequate for that purpose.

³⁴ 76 Fed. Reg. 5,719 (Feb. 2, 2011).

³⁵ 75 Fed. Reg. 81,165 (Dec. 27, 2010).

operators, but for our key mine examiners who are the first line of defense in identifying hazards during their pre-shift, on-shift, and weekly examinations. The additional record-keeping burden, alone, of dealing with more than 230,000 additional violations of mandatory health standards annually is very problematic—not to mention the real likelihood that this proposed rule contains a multitude of new opportunities for violations should the proposal be promulgated as proposed.

In sum, for all of the reasons stated above, Murray Energy is of the firm opinion that this NPR is neither economically or technologically feasible.

The NPR Fails to Adequately Consider a Number of Presidential Executive Orders

Executive Order 12,866

In MSHA's analysis of its compliance with Executive Order 12,866, "Regulatory Planning and Review," among other flawed assertions, MSHA claims that, based on its Preliminary Regulatory Economic Analysis ("PREA"), the NPR "would not have an annual effect of \$100 million or more in terms of compliance costs to the economy and therefore it is not an economically significant regulatory cost action pursuant to section 3(f)" of the Executive Order.³⁶ Frankly, this annual effect is so outlandishly low, that it defies any sense of real world impacts. Confounding reality further, the Agency claims that annual "benefit effects of the [NPR] are likely to exceed \$100 million and would be economically significant in terms of benefits."³⁷ The previously noted report of Dr. Cantor commenting on the PREA shows (by way of brief summary) that MSHA has vastly underestimated the costs and grossly exaggerated the supposed benefits of the NPR. Dr. Cantor states that the *costs of work stoppages alone, were the*

³⁶ 75 Fed. Reg. 64,473.

³⁷ *Id.*

NPR to be promulgated as proposed and enforced as it is written, would be in the range of \$1.6 billion for underground coal mining. We maintain that amount of money, all by itself (and there are more costs than \$1.6 billion identified by Dr. Cantor), make this NPR an economically significant cost under the Executive Order, thus mandating much greater scrutiny by the Office of Management and Budget's ("OMB") Office of Information and Regulatory Affairs ("OIRA"). Should a final rule, based on the NPR, be submitted to OIRA for review, Murray Energy will be fully prepared to inject a dose of economic cost-benefit reality into any future MSHA analysis on the issue by seeking a meeting with OIRA at the appropriate time.

Moreover, even if MSHA's PREA were on target (which it most assuredly is not), this NPR must still be considered to be a "significant regulatory action" under § 3 (f) of the Executive Order, because there can be absolutely no doubt that this NPR would dramatically change MSHA's respirable coal mine dust sampling program from its statutory roots contained in the Federal Coal Mine Health and Safety Act of 1969, one based on averages of gravimetric sampling over a number of shifts to sampling by the CPDM over a single full shift only. Such a revolutionary change clearly raises the kind of "novel legal or policy issues" contemplated under § 3(f)(4) of the Executive Order.

Executive Order 13,583

Of course, the NPR was not even reviewed under Executive Order 13,563 of January 18, 2011, "Improving Regulation and Regulatory Review,"³⁸ since the NPR was published in October 2010. However, should this NPR be developed as a final rule by MSHA, the package will have to be reviewed by OIRA, pursuant to the terms of the new Executive Order.

³⁸ 76 Fed. Reg. 3,821 (Fri. , Jan. 21, 2011)

In that regard, we urge MSHA to conform to §4 of the Executive Order, “*Flexible Approaches*.”³⁹ We strongly believe, for example, that this section, which urges each agency “to reduce burdens and maintain flexibility and freedom of choice for the public,”⁴⁰ provides MSHA with additional authority to utilize fully the hierarchy of controls, discussed in connection with the use of appropriate respiratory protection for miners.

Furthermore, the Companies note §5 of the new Executive Order dealing with “Scientific Integrity,” and reminding that “each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency’s regulatory actions.”⁴¹ All of the reports attached to these comments, as well as the separately filed analysis of Drs. Gamble and Reger, and Mr. Glenn show that the NPR is in great jeopardy of failing any test for scientific integrity.

Conclusion

To conclude, for all the reasons above, Murray Energy urges MSHA to withdraw this NPR and start afresh. We agree that the current rules are in need of revision and are prepared to work with the Agency and other stakeholders. However, we believe that the current respirable dust limit of 2.0 mg/m³ is still solidly based in science and, if properly implemented by MSHA and all stakeholders, it will prevent miners from developing CMP. Murray Energy is also prepared to work with MSHA and other stakeholders to test the CPDM to ascertain its reliability in the rugged conditions of underground coal mining. However, we are unpersuaded that use of a single-full shift measurement for compliance purposes will either be a feasible approach or will

³⁹ *Id.* 3,822.

⁴⁰ *Id.*

⁴¹ *Id.*

accurately represent the atmospheric conditions to which miners are exposed. We also urge MSHA to join the rest of the world's occupational health community by allowing application of the hierarchy of controls such that appropriate respiratory protection can be used as a supplementary control to protect miners from respirable coal mine dust. And finally we urge MSHA to work with NIOSH to make medical monitoring of miners CMP mandatory and to allow the involvement of mine operators in such monitoring as we have suggested in our comments herein.

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