
From: Green, Edward [mailto:EGreen@crowell.com]

Sent: Monday, August 01, 2011 3:42 PM

To: zzMSHA-Standards - Comments to Fed Reg Group; Fontaine, Roslyn B - MSHA

Subject: RIN 1219-AB75: Supplemental Comments of Murray Energy Corporation on MSHA's Proposed Rule on Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards--

Importance: High

2011 AUG -1 P 5:15

Pursuant to MSHA's notice published in the Federal Register for June 20 (76 Fed. Reg. 35,801), attached please find the supplemental comments of Murray Energy Corporation on RIN 1219-AB75: MSHA's Proposed Rule on Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards. Thank you for the opportunity to comment on the proposal.

Sincerely,

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AB75-COMM-28



August 1, 2011

Ms. Roslyn B. Fontaine, Chief
Acting Director
Office of Standards, Regulations, and Variances
Mine Safety and Health Administration
U.S. Department of Labor
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

**Re: Supplemental Comments of Murray Energy Corporation on MSHA's
Proposed Rule on Examinations of Work Areas in Underground Coal Mines
for Violations of Mandatory Health or Safety Standards: RIN 1219-AB75**

Dear Ms. Fontaine:

Introduction

Pursuant to the notice published in the Federal Register for June 20, 2011 (76 Fed. Reg. 35,801), announcing additional public hearings and an August 1, 2011 deadline for the filing of post-hearing comments, set forth herein are the comments of Murray Energy Corporation ("MEC") supplementing MEC's initial comments of March 28, 2011 (AB75-COMM-16) on MSHA's Proposed Rule on Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards (the "NPR"), published in the Federal Register for December 27, 2010 (75 Fed. Reg. 81,165). Our post-hearing comments focus on the following three topics:

- Our Freedom of Information ("FOIA") letter of March 17, 2011 and MSHA's reply of April 28, 2011;
- Our concerns about the damaging effect of the NPR on the mine examiner certification programs of the coal mining states; and
- Our additional suggestion to MSHA as to why violations of mandatory standards recorded in examination books and corrected in a reasonable time should not be cited or penalized under the provisions of §§ 104 and 110 of the Federal Mine Safety and Health Act of 1977, as amended.

Our March 17, 2011 FOIA Letter and MSHA's April 28, 2011 Reply

In our initial comments of March 28, noted above, we stated that the analysis of the benefits of the proposed rule, as required by Executive Order 12,866, "Regulatory Planning and Review," was extremely poorly reasoned. Without repeating our initial comments,¹ in brief, our view was based upon our vehement disagreement with MSHA's purported "analysis" of 15 fatalities that, according to the Agency, specifically listed in the MSHA investigation reports, violations of mine examination standards.² In its "analysis," MSHA claimed that nine of the fatalities involved violations of mandatory health or safety standards which could have been prevented by a proper mine examination in accordance with the proposed rule. After several informal but unsuccessful efforts to obtain documentation for these Agency analyses, we filed a FOIA request on March 17, 2011 to obtain them. By the original close of the comment period, however, MSHA had not responded to this letter. Our March 17 FOIA letter and the emails regarding our informal efforts to obtain the documentation of these analyses are attached to our initial comments.

We appreciated receiving an April 28, 2011 letter from your colleague, Lanesia Washington, responding to our March 17 FOIA request and a copy is attached to these supplemental comments. Ms. Washington's reply stated that MSHA personnel "conducted a search for documents responsive to [our] request and were not able to locate any other than the proposed rule and the fatality reports themselves. . . ." That response, we respectfully submit, confirms our view that, without such documentation, there is no support for the Agency's purely conclusory claims that nine of the 15 cited fatalities could have been prevented by this proposed rule. The serious business of protecting miners by carefully performed mine examinations deserves better than such a flimsy analysis of purported benefits.

Our Concerns about the Damaging Effect of the NPR on the Mine Examiner Certification Programs of the Coal Mining States

MEC has paid particular attention to the June 15 public hearing held by MSHA at its headquarters in Arlington, Virginia, especially the testimony presented by Greg Conrad, Executive Director of the Interstate Mining Compact Commission. We fully share Mr. Conrad's concerns about the debilitating effect this NPR may have on state mine examiner certification programs. We wish to endorse his testimony and incorporate it into these supplemental comments as though fully set forth.³ MSHA has long recognized the value of these state programs. Indeed, they are actually provided for in both the Federal Mine Safety and Health Act

¹ See AB75-COMM-16 at 13-16.

² 75 Fed. Reg. 81,169

³ See Transcript of Proceedings In The Matter of Examination of Work Areas In Underground Coal Mines For Violations Of Mandatory Health or Safety Standards, Arlington, Virginia, June 15, 2011 at 9-15.

of 1977 (the “Mine Act”), as amended, and in the implementing mandatory safety standards in 30 C.F.R. Part 75. Thus, in section 318 of the Mine Act, the word “certified” as applied to any person means a person registered by the State in which the coal mine is located to perform duties prescribed by the Mine Act. Such duties include those of mine examiners, as spelled out in Mine Act §§ 303 (d), (e), and (f). Those statutory requirements are repeated virtually verbatim in sections 75.2, 75.100, and 75.360 through 75.364 of Part 75.

In short, MEC is concerned that this proposed rule, if promulgated in its current form, could lead to the (unintended—we hope) consequence of dismantling state certification programs for mine examiners. That could be a tragic outcome for our underground employees and the Nation’s other underground coal miners.

Our Additional Suggestion as to Why Violations of Mandatory Standards Recorded in Examination Books and Corrected in a Reasonable Time Should Not Be Penalized Under Mine Act §§ 104 and 110

In our initial comments, we expressed grave concerns that the NPR would cause many more citations to be issued by MSHA inspectors for no useful safety and health purposes, with the consequence of increasing the already staggering (and growing) backlog of cases before the Federal Mine Safety and Health Commission.⁴ We also commented on our concerns about Constitutional due process and self incrimination infirmities.⁵ At the very least we urged MSHA to modify the proposed rule language to state that “violations that are recorded in the examination books and which are corrected within a reasonable time will not be cited or penalized as violations for purposes of Mine Act §§ 104 ad 110.”⁶

As an additional suggestion in support of this modification, we wish to refer MSHA to a discussion of OSHA voluntary self audits in the 2010 House of Representatives Education and Labor Committee Report of H.R. 5663, The Robert C. Byrd Miner Safety and Health Act Of 2010. While mine examinations are not voluntary and we well understand the differences between the Mine Act and OSHA’s enabling statute, we believe the following idea is very suitable as support for our suggested modification above. Thus, the Committee Report stated “. . . where a voluntary self audit identifies a hazardous condition and the employer has corrected the violative condition prior to the initiation of any inspection and taken steps to prevent the recurrence of the condition, the Agency will refrain from issuing a citation. *To encourage voluntary self audits and prompt corrective actions, the Secretary is urged to develop a similar policy with regards [sic] to the Mine Act.*” (Emphasis added.)⁷ We were adamantly opposed to

⁴ See AB75-COMM-16 at 11 and 12.

⁵ *Id.*

⁶ *Id.* at 12.

⁷ H.R. Rep. No. 111-579, at 92 (2010).

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the Byrd Bill in 2010 and remain in such opposition to the 2011 version of the bill. We also are adamantly of the view that this NPR should be withdrawn entirely. Nevertheless, should MSHA decide to proceed with a final rule, we urge the application of this Report language to any such rule.

We appreciate the additional opportunity to comment on the NPR and hope you find these supplemental comments to be useful.

Sincerely,



Edward M. Green
Counsel for Murray Energy Corporation

Attachment

DCACTIVE-15802022.1

U.S. Department of Labor

Mine Safety and Health Administration
1100 Wilson Boulevard
Arlington, Virginia 22209-3939



APR 28 2011

Mr. Edward M. Green
Crowell and Moring
1001 Pennsylvania Ave., NW.
Washington, DC 20004

Re: Freedom of Information Act Request - Tracking No. 640388

Dear Mr. Green:

This letter is in response to your March 17, 2011, Freedom of Information Act request seeking a copy of the "... 'analysis of the 15 fatalities' specified at Page 81169 of the *Federal Register* publication of the proposed rule (Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards, 75 *Fed. Reg.* 81165, 81168) and all MSHA documents prepared in development of this analysis."

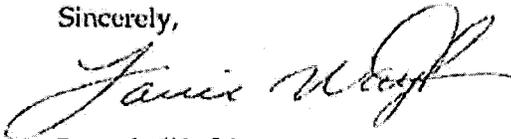
We conducted a search for documents responsive to your request and were not able to locate any other than the proposed rule and the fatality reports themselves, which we understand you have already.

I believe that we have been responsive to your request. Should you disagree, you may file an appeal to the Solicitor of Labor within 90 days from the date you receive this letter. The appeal must state, in writing, the grounds for the appeal, including any supporting statement or arguments. To facilitate processing of the appeal, the appeal should include the appellant's mailing address and daytime telephone number, as well as copies of the initial request and the Disclosure Officer's response. The envelope and the letter of the appeal should be clearly marked "Freedom of Information Act Appeal." Any amendment of the appeal must be in writing and received prior to a decision on the appeal. The appeal should be addressed to:

Solicitor of Labor
U.S. Department of Labor
200 Constitution Avenue, N.W. Room N-2428
Washington, D.C. 20210

Appeals also may be submitted by fax to 202-693-5538 or email to foiaappeal@dol.gov.
Appeals submitted to any other email address will not be accepted.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lanesia Washington".

Lanesia Washington
MSHA Freedom of Information Act Officer
Office of Standards, Regulations and Variances