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March 28, 2011

Ms. April E. Nelson
Acting Director
Mine Safety and Health Administration
Office of Standards, Regulations, and Variances
1100 Wilson Boulevard
Room 2350
Arlington, VA 22209-3939

Re: 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. Nelson:

Introduction and Overview

Please find below the comments of Murray Energy Corporation ("MEC") on MSHA's Proposed Rule on Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards, published in the Federal Register for December 27, 2010. 75 Fed. Reg. 81,165. MEC 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. MEC's subsidiaries operate eight underground and surface mining operations, plus 40 subsidiary and support companies. Transporting coal via truck, rail, and waterways, MEC operates the second-largest fleet of longwall mining units in the country. With a support team of 3,000 hard-working, dedicated, and talented employees in six states, MEC's affordable high-quality coal is mined safely and efficiently, and is supplied to leading producers of electricity, both domestically and abroad.

For the reasons set forth in more detail below, MEC respectfully urges MSHA to withdraw this proposed rule. In short, we believe the proposal would:

• significantly change the general scope of examinations under the existing standards (contrary to the assertions in the preamble that the proposal would not do so);

• reduce the protection afforded miners by the existing standards in violation of § 101(a)(9) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 801, 811(a)(9) (the "Mine Act");

• result in wrong-headed policy for all of the reasons described in the preambles to the two earlier rulemakings on this issue in which the same concept was rejected by previous

AB75 -Comm-16

Administrations, which will therefore lead to substantial and unnecessary burdens on the underground coal mining industry, with mandatory workloads for mine examiners increasing significantly, accompanied by the real potential for concomitant increased liability for mine examiners under Mine Act § 110(c);

• cause many more citations to be issued by MSHA inspectors for no useful safety and health purpose, with the consequence of increasing the already staggering backlog of cases before the Federal Mine Safety and Health Review Commission; and

• violate a number of the President's executive orders and memoranda in connection with rulemakings like this proposal, including the requirements for an accurate regulatory economic analysis of the proposed rule.

We now turn to a more thorough discussion of each of the flaws identified above. Any of them alone should cause MSHA to withdraw this proposal. Their collective weight demands that the proposal must be scrapped.

The Proposal Would Significantly Change the General Scope of Examinations Under Existing Standards

The preamble to the proposed rule states that "MSHA does not intend that the proposal would significantly change the general scope of examinations under the existing standards." 75 Fed. Reg. 81,167. If that statement is accurrate, then the proposed rule should be scrapped because it would be contrary to MSHA's purported intent, drastically changing how examinations are conducted and the amount of time they will consume. We say this because the proposed rule dramatically expands the mandatory duties imposed on mine examiners from checking for hazards to checking for "violations" of any mandatory health or safety standards, whether or not such a violation poses a hazard.

By way of background, the issue of working area examinations has been dealt with by previous Secretaries of Labor in different Administrations—those of Presidents Ronald Reagan, George H.W. Bush and Bill Clinton. We discuss these rulemakings in more detail below; but, by way of illustration of how the current proposal would significantly change the scope of mine examinations under the standards now in effect, we wish to point out that, in 1988, during the Reagan Administration, the Secretary proposed to change the language of the *interim* mandatory preshift safety standard that had been carried over from the Federal Coal Mine Health and Safety Act of 1969 (the "1969 Act") verbatim (now Mine Act § 303(d)(1), 30 U.S.C. § 863(d)(1)). During the development of *improved* mandatory safety standards, in the 1988 proposed revisions, the Secretary stated that "the preshift examination is not intended as a complete mine inspection." 53 Fed. Reg. 2,401 (Jan. 27, 1988).[1] Then, in the preamble to the final rule

[1] Section 301(a) of the 1969 Act (now Mine Act § 301(a), 30 U.S.C. § 861(a)), provides: "The provisions of sections 302 through 318 of this title shall be *interim* mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by *improved*

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promulgated in 1992, during the Bush Administration, the Secretary stated that, "as proposed, *the final rule does not include a provision authorizing expansion of the preshift examination to include examination for violations of mandatory standards.*" 57 Fed. Reg. 20,894 (May 15, 1992) (emphasis added). The Secretary reasoned:

> Most "hazards" are violations of mandatory standards. MSHA believes that authorizing the district manager to require the preshift examination to include examination for other hazards ensures that preshift examinations are tailored to provide the necessary protection for miners. *Also requiring the preshift examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination. The preshift examination is designed to concentrate the examiners [sic] efforts in those areas where they are most suitably applied.*

Id. (emphasis added). This key fundamental concern was repeated in the Clinton Administration's 1996 revised rule – *expressly rejecting* a proposed revision that would similarly have required preshift and weekly examiners to examine for violations – because, upon further consideration, *the Secretary again agreed that such an added requirement would distract mine examiners from their primary objective of examining for hazards. See* 61 Fed. Reg. 9,793 (March 11, 1996).

The current proposed rule would go even farther than any prior rule or even any proposed rule, by requiring not only the preshift and weekly examiner to examine for violations of mandatory standards, but also by mandating that the supplemental and on-shift examiners do so, and by making foremen responsible for recording all violations during normal operations. *See* 75 Fed. Reg. 81,175-76. Those latter proposed requirements were never even part of the interim mandatory safety standards in the 1969 Act. Moreover, whereas the 1994 proposed revision (that was rejected upon final promulgation in 1996) would have limited the examination requirement to only those violations "that could result in a *hazardous* condition," 59 Fed. Reg. 26,373, 26,378-79 (May 19, 1994) (emphasis added), the current proposed rule would impose no such limitation, and thus require the mine examiners – as well as mine foremen during regular work – to record *all violations, no matter how "technical" in nature.*

Basically, should the current proposal become law, mine foremen and other certified mine examiners will be preoccupied with hunting for any and all violations, *whether they present hazards or not.* Thus, the idea that the proposed rule will not "significantly change the general scope of examinations" is simply wrong, and is belied by the regulatory history of the

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mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act...." (Emphasis added.)

examination rules highlighted here and which we next review in more detail. For this reason alone (as well as others) the current proposal should be withdrawn.

The Proposal Would Reduce the Protection Afforded Miners by the Existing Standards in Violation of Mine Act § 101(a)(9)

The proposed rule would also violate Mine Act § 101(a)(9), inasmuch as it would "reduce the protection afforded miners" by the current standards. *See* 30 U.S.C. § 811(a)(9). The examination rules in existence from 1970 to 1992, adopted verbatim from the statutory language of § 303 of the 1969 Act, 30 U.S.C. § 863, required preshift examiners to examine for violations (as well as hazards), on-shift examiners to examine for hazards only, and weekly examiners to examine for "compliance with" mandatory standards (as well as hazards). *See* 30 C.F.R. §§ 75.303(a), 75.304, and 75.305 (1976), derived word-for-word from §§ 303(d)(1), (e), and (f) of the 1969 Act. As interim mandatory standards, the Secretary was authorized to improve upon them through rulemaking, *see* 30 U.S.C. §§ 811(a), 861(a), subject to the condition of Mine Act § 101(a)(9) that no such improved rule could reduce protection to miners.[2] This improvement the Secretary made in 1992.

In the 1988 preamble to the proposed rule, the Secretary stated in relevant part:

> The proposed rule would clarify, reorganize, and update the existing ventilation standards that were promulgated more than 15 years ago. *Miner safety and health would be improved by providing standards for and encouraging the use of advances in ventilation technology and by upgrading the quality of examinations for hazardous conditions that are conducted in all mines.*

53 Fed. Reg. 2,382 (Jan. 27, 1988) (emphasis added). Regarding preshift examinations in particular, the 1988 preamble stressed the focus on hazard identification, *id.* 2,400-01, and expressly stated that not all violations needed to be noted and dangered off because "*the preshift examination is not intended as a complete mine inspection.*" *Id.* 2,401 (emphasis added). The proposed rule for on-shift and weekly examinations also stressed hazard identification, *id.* 2,402-03, and the proposed weekly examination rule eliminated the requirement that those examiners also check for compliance with the mandatory standards. *See id.* 2,420.

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[2] Mine Act § 101(a)(9) provides: "No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard." 30 U.S.C. § 811(a).

When the final rule was promulgated in 1992, during the Bush Administration, the Secretary stated in the preamble:

> The final rule revises the existing standards for coal mine ventilation in 30 CFR part 75 which were promulgated over 20 years ago. In developing the rule, the Agency reviewed each revision and deletion to provisions contained in existing standards as well as each new provision in the final rule to ensure that the level of protection provided miners by existing standards is not reduced. *In accordance with section 101(a)(9) of the Mine Act, the standards in the final rule do not reduce the level of protection afforded miners by the existing rules. In many cases, protection of miners' safety and health is enhanced by these revisions. For example,* new standards that encourage the use of advances in ventilation technology and *revised standards that upgrade the quality of examinations for hazardous conditions that are conducted in all mines improve protection for miners.*

57 Fed. Reg. 20,868 (May 15, 1992) (emphasis added).

As noted earlier, the final 1992 preshift rule discarded the requirement that examiners check for violations of mandatory standards, specifically because "*requiring the preshift examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination,*" and because "[t]he *preshift examination is designed to concentrate the examiners [sic] efforts in those areas where they are most suitably applied.*" *Id.* 20,894 (emphasis added). The on-shift rule never required examination for violations, so the issue was not addressed in that context in the 1992 rule. The weekly examination rule, however, which had required the examiner to check for "compliance" with mandatory standards, was also revised to reflect – as with the revised preshift rule – the Secretary's increased appreciation for the need to focus such examinations on hazards so as not to get distracted with, and thus diminish safety because of, non-hazardous "violations." On this point, the Secretary stated in the 1992 preamble:

> The final rule does not specifically indicate that this examination must verify compliance with mandatory health or safety standards as under the existing rule, but the weekly examination for hazardous conditions conducted under the final rule inherently includes a determination of compliance with mandatory standards since ordinarily most hazardous conditions in a mine would result from a violation of a safety or health standard. *Requiring the examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination. This examination, like other examinations required by the final rule, is designed to concentrate the examiners [sic] efforts in those areas where they are most suitably applied.*

Id. 20,897 (emphasis added).

It is clear, therefore, that in revising the examination rules in 1992 pursuant to Mine Act § 101(a), the Secretary determined that it was in the interest of greater miner safety to do away with the distraction of the added and heavy burden placed on examiners to look out for all violations, and to require instead that they focus their attention on actual hazard identification. Having taken that step and expressly found that the 1992 rule enhanced the safety of miners, the Secretary cannot go back, and nothing in the preamble to the current proposed rule addresses why, all of a sudden, the old (*and discredited*) language of the 1969 Act now better promotes safety for miners.

We say discredited because, indeed, we have been here before. In 1994, during the Clinton Administration, the Secretary initially proposed reverting, at least partially, to a rule that would require preshift and weekly examiners to examine not only for hazards but also for violations of mandatory standards. But even that proposal recognized the central aim of using examinations to identify hazards, by limiting the "violations" that had to be recorded to those that "could result in a hazardous condition." 59 Fed. Reg. 26,373 (discussion of proposed preshift examination rule), 26,378-79 (discussion of proposed weekly examination rule), 26,394-95 (text of proposed preshift examination rule), 26,396-97 (text of proposed weekly examination rule).

This 1994 proposal was not adopted in the final rule promulgated in 1996. Just as in the Bush-era 1992 final rule, the preamble to the Clinton-era 1996 final rule noted comments recommending the deletion of that requirement of the proposed preshift examination rule because, among other things, it would inevitably cause mine examiners to shift their focus from "true hazards to noncompliance." 61 Fed. Reg. 9,793 (Mar. 11, 1996). Assistant Secretary McAteer agreed, stating:

> The preshift examination requirements in the final rule are intended to *focus the attention of the examiner in critical areas.* This approach is consistent with the fundamental purpose of preshift examinations which is to discover conditions that pose a hazard to miners. *MSHA is persuaded that to require examiners to look for violations that might become a hazard could distract examiners from their primary duties.* The final rule, therefore, does not adopt this aspect of the proposal.

Id. (emphasis added).

The same approach was taken in the final weekly examination rule. In the preamble, the Secretary noted the many objections to requiring mine examiners to shift their focus from hazards to "noncompliance," which would only serve as a "diversion of the examiner's attention away from key safety conditions to minor compliance issues." *Id.* 9,806. Thus, again, the Secretary was persuaded that retaining the focus on indentifying hazards was in the best safety interests of miners:

> As discussed in the preamble to the 1992 rule, most hazards are violations of mandatory standards. *Requiring the examiner to look for all violations regardless of whether they involve a distinct hazard could distract the examiner from the more important aspects of the examination.* Despite an attempt in the proposal to limit the scope of the examination for noncompliance to situations that, "could result in a hazardous condition," commenters expressed a high level of misunderstanding. Although a similar requirement existed between 1970 and 1992, MSHA generally did not broadly apply the standard. After consideration of all comments and a review of the history since the current standard became effective, *MSHA concludes that the existing standard is appropriate and best serves the objective of giving examiners clear guidance for making effective examinations.* Accordingly, the proposal for examinations to include noncompliance with mandatory safety and health standards is not adopted in the final rule."

Id. (emphasis added).

Given this regulatory history, especially the repeated past findings of previous Secretaries of Labor in different Administrations (on both sides of the political aisle) that requiring mine examiners to examine not only for hazards but also for violations of mandatory standards would distract from the central aim of examinations and thus make examinations less effective, thereby exposing all miners to greater hazards, and to add for the first time a violations-identification and recording requirement for supplemental and on-shift examinations and for foremen during their regular work routines, would clearly reduce miner safety and thus run afoul of Mine Act § 101(a)(9). The December 2010 proposed rule effectively adds back the "distracting" element

that the 1992 rule eliminated and which the 1996 rule affirmed should stay eliminated. Thus, the new 2010 proposal would, contrary to law, reduce the level of safety currently afforded to miners. Thus, even if not otherwise misguided, the proposed rule must be withdrawn because it violates the Mine Act.[3]

The Proposal Would Result in Wrong-Headed Policy, Unnecessary Burdens on the Underground Coal Mining Industry, Significantly Increased Workloads for Mine Examiners, and Over-Recording Because of the Real Potential for Criminal Liability for Mine Examiners Under Mine Act § 110(c)

We want to emphasize that irrespective of the illegality of the proposed rule under § 101(a)(9), as discussed above, the proposed rule is also bad policy for all of the reasons noted in the preambles to the 1992 and 1996 final rules. Nothing has changed that would make adding the demands of the proposed rule to the critically important requirements of the jobs of mine examiners and mine foremen any less distracting than already determined by previous Secretaries of Labor. Thus, the proposal would result in less safety for all underground coal miners. This is especially important to highlight because the preamble to the new proposal specifically states, in connection with review thereof by the Office of Management and Budget ("OMB") under Executive Order 12,866: "The proposed rule raises novel, legal or policy issues and is therefore subject to OMB review." 75 Fed. Reg. 81,168. MEC is pleased that MSHA recognizes the need for OMB to review this proposal. Promulgation of this proposal would, indeed, raise novel legal and policy issues. The rejection of these policies by the previous Administrations discussed above should serve as a beacon for both the current Secretary and for OMB on the proposition that the proposal should be rejected again.

The proposed rule is also overly burdensome. Conditions in underground coal mines that constitute "violations of mandatory health or safety standards" can often be very subjective in nature, and such conditions are not always hazardous in and of themselves. The Secretary recognized this in 1992, *see* 57 Fed. Reg. 20,894 ("MSHA recognizes that 'technical' violations of mandatory standards may not immediately endanger miners..."), and again in 1996. *See* 61 Fed. Reg. 9,806. Even in this new proposal, the preamble notes (in connection with "fix[ing] a violation") that "it may take two days" to do so. 75 Fed. Reg. 81,167. The preamble goes on to say: "*Assuming that the violation does not pose a hazard to miners*, the two days would generally be considered reasonable." *Id.* (emphasis added). And the contention can hardly be

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[3] MEC wishes to note here the statement of MSHA Assistant Secretary Joseph A. Main at the March 3, 2011, hearing, "Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration," held before the Subcommittee on Workforce Protections of the House Committee on Education & the Workforce. At that hearing, in connection with this proposed rule, Assistant Secretary Main said: "If implemented, this rule would reinstate requirements in place for about 20 years following passage of the 1969 Mine Act." Main Statement at 13. True enough, but the Assistant Secretary ignores the judgments of his two predecessors who concluded that those requirements were outmoded and so distracting to the vital work of mine examiners that their elimination was warranted.

debated. For example, one might imagine a foreman driving in an underground vehicle and brushing momentarily against a mine rib such that his side mirror gets bent so that he can no longer see what is behind him on that side. Does he have to record that bent mirror as a violation of 30 C.F.R. § 75.1725(a) or can he just fix the problem and continue on his way?[4] Or what if one too many water sprays gets clogged so that the number of sprays required by the mine's ventilation plan is momentarily not functioning. Can the foreman or preshift examiner just stop and unplug one of the sprays, or must he record it as a violation of the ventilation plan mandated by 30 C.F.R. § 75.370? The term "violation," after all, admits of no exceptions.[5]

We recognize that, as stated in the preamble, the primary aim of the proposed rule is to make operators more proactive in identifying and correcting violations of those standards that are perennially among the most cited. *See* 75 Fed. Reg. 81,167. Clearly, though, the proposed rule is not limited to making examiners responsible for finding and recording only those violations that are frequently cited. Moreover, the concern with perennial violations is overstated, unfairly so. The most-cited standard in underground coal mines, year after year, for example – § 75.400 – is also the most subjective.[6] Coal and coal dust naturally "accumulate" as a result of the mining process. Technically, every operator is in violation the instant its cutter hits coal. Citations accumulate under this standard not so much because operators are not vigilant about routinely cleaning up their accumulations, but because it is simply impossible to keep the mine environment continually free of what an MSHA inspector who randomly shows up at the mine in between cleaning cycles considers to be a citable accumulation. The proposed rule will not change this, for § 75.400 accumulations or for any of the other most-cited standards – they are the most cited because, by their nature, they are the hardest to identify[7] given their often amorphous and subjective nature, and yet they require the most resources to remain in compliance, and this would continue to be true even with this proposed rule.

To be clear, we recognize that the standards most frequently cited stem from conditions that are often hazardous, or potentially so, and that is why operators are already vigilant in their

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[4] 30 C.F.R. § 75.1725(a) provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

[5] Determining what actually is, in fact and law, a violation is quite another matter, often depending on subjective judgments, line-drawing, and the latest policies and interpretations of the Agency.

[6] 30 C.F.R. § 75.400 states: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

[7] Another most-cited standard that MSHA lists is § 75.403, which requires the incombustible content of coal and rock dust be at least 80%. The naked eye cannot tell the difference between 79% (forbidden) and 80% (compliant) incombustible content. Examiners will have to record as violations any such "gray" area, even if actually compliant.

attention to such conditions during required mine examinations and at all stages of operation. But hazard identification and correction is a constant, ongoing process because the conditions giving rise to potential hazards are constantly developing within the ever-changing, dynamic underground environment, at the working sections and in more remote locations alike. Nothing is gained *from a safety standpoint*, however, by requiring examiners to go beyond hazard identification and correction and forcing them to record such conditions as "violations" *per se*. It will merely bog down examiners and other miners by requiring them to give undue attention to non-hazardous "violations," and this in turn will have a significant impact on both the effectiveness of mine examinations, as well as production. At no clear gain to safety that we can identify, the proposed rule is very ill-conceived.

Moreover, the proposed rule subjects mine examiners – as the individuals who would now be specifically responsible for catching all violations in the examined areas – to liability under Mine Act § 110(c) far out of proportion to their traditional responsibilities to examine for hazardous conditions, and puts mine examiners between the rock of recording as "violations" conditions that neither he nor the operator may believe are violations at all and the hard place of individual liability for failing to record a violation subsequently alleged by an MSHA inspector.[8] Lost in this scenario – which is certain to arise sooner or later – will be whether the condition cited by MSHA as a violation poses a hazard at all. The Secretary should retain the current structure, allowing the examiner to do his job of examining for hazards, while the MSHA inspector enforces the law as he inspects for violations.[9]

The proposed rule also exposes the operator to a double-liability: if the examiner does not catch a violation that, upon subsequent inspection by MSHA, the Secretary believes exists, the operator will face two enforcement actions: a citation or order for the underlying "violation," and a citation or order for an incomplete or inadequate examination as evidenced by the failure to record the "violation" as required by this proposed rule.

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[8] Mine Act § 110(c) provides, in part: "Whenever a corporate operator violates a mandatory health or safety standard...any director, officer, or agent of such corporation who knowingly...carried out such violation,...shall be subject to ... civil penalties, fines, and imprisonment." Mine examiners are agents of corporate operators. It is considered a violation to conduct an inadequate examination, so if a mine examiner makes a judgment call to not record a condition that an MSHA inspector later considers in his subjective opinion to be a violation, the examiner would be open to the charge of knowingly violating this proposed rule and carring out an inadequate examination. The upshot is that examiners will stop to record anything that remotely resembles a violation, or that they fear an aggressive inspector may deem to be one. As a result, the examination books will become defensively filled with potential violations by understandably liability-averse examiners and, as discussed *infra*, mine operators will be hard-pressed to contest citations predicated on these "admissions" of "violations."

[9] Mine examiners are trained to find hazards, and not necessarily to be experts in all the standards at the same level as an MSHA inspector. Moreover, mine examiners are not privy to the latest interetative and enforcement policy nuances with which MSHA's inspectors are armed.

The Proposal Would Cause Many More Citations to Be Issued by MSHA Inspectors for No Useful Safety and Health Purpose, With the Consequence of Increasing the Already Staggering Backlog of Cases Before the FMSHRC

We are also very concerned that the proposed rule will lead to many more citations being issued by MSHA as a result of the "violations" required to be recorded under the five distinct examination or hazard-identification standards: preshift (§ 75.360), supplemental (§ 75.361), on-shift (§ 75.362), weekly (§ 75.364) and the general hazard-identification standard (§ 75.363). This concern is because Mine Act § 104(a) states that an MSHA inspector or investigator "shall" with reasonable promptness[10] issue a citation if he "believes" the operator "has violated" the statute or a regulation. 30 U.S.C. § 814(a). In other words, *it compels a citation on the mere belief that a violation occurred*, even though it no longer exists when he does his inspection. It stands to reason, then, that when an inspector reviews the "violations" recently recorded by the examiner, he or she will be obligated by § 104(a) to issue a citation for each such violation (or, worse, a citation or order under the unwarrantable failure provisions of § 104(d) – which also uses the term "shall"). *See Emerald Mines Co. v. Fed. Mine Safety & Health Review Comm'n*, 863 F.2d 51 (D.C. Cir. 1988) (inspector could issue an unwarrantable failure order for conditions that occurred outside of sight of inspector and had already been abated before inspector arrived at the mine).

Concomitantly, and further to OMB's stated interest in "novel legal issues," we are concerned about the due process implications of the proposed rule in light of the potential evidentiary effects of a "violation" being recorded by the examiner. In general, examiners lack authority to assess on behalf of the operator whether a condition was properly cited as a violation by MSHA for purposes of deciding whether to contest the resulting citation or order at the Federal Mine Safety and Health Review Commission (the "Commission"). It is the general counsel or another high-level officer who decides which violations to contest. This proposed rule, however, will force mine examiners into the role of making judgment calls as to whether a condition is a "violation," which puts him in a very awkward and difficult position with his employer – essentially deputizing the examiner to do the enforcement bidding of MSHA. To add to that ill-considered situation is the very real possibility that, in doing so, the examiner will jeopardize the operator's subsequent right to contest a violation at the Commission because the record of the violation will constitute an admission under the rules of evidence,[11] or the examiner will implicate himself if he records a violation that does not get corrected. This situation violates traditional notions of fairness and due process, and likely violates the right against self-

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[10] "This requirement [of reasonable promptness] could be construed to cover not only the inspection to citation time lag but the *violation to citation* span as well." *Emerald Mines Co. v. Fed. Mine Safety & Health Review Comm'n*, 863 F.2d 51, 59 (D.C. Cir. 1988) (emphasis added).

[11] Federal Rule of Evidence 801(d)(2)(D) states: "A statement is not hearsay if – the statement is offered against a party and is a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Mine examiners are agents of corporate operators.

incrimination protected by the Fifth Amendment to the U.S. Constitution, given the potential for criminal liability under the Mine Act.

In light of these concerns, and to the extent the Secretary does not rescind the proposed rule outright (as she should), we urge the Secretary to, at the very least, modify the respective proposed rules 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 and 110." If the Secretary's aim truly is to make operators more proactive in eliminating hazardous conditions and reducing violations, then we see no reason why the Secretary would not revise the rule as we recommend. MEC urges the Secretary and OMB to carefully consider this recommendation.[12]

The purported basis for the rule is that "to assure optimum safety of miners, it is imperative that operators find violations of health or safety standards, correct them, and record corrective actions taken." 75 Fed. Reg. 81,167.[13] As noted, MSHA specifically purports to be concerned with earlier detection of the perennially most cited standards. *See id.* The proposed rule, however, is a poor means of accomplishing that objective. In addition to the unfairness of placing this burden fully on the shoulders of mine examiners, and the distractions that the proposed rule would cause for the reasons noted above and by prior administrations, it seems the laudable objective of optimizing miner safety – already the objective of all existing regulations and, indeed, the "first priority" of the Mine Act and operators (Mine Act § 2(a)) – could more effectively be addressed (if MSHA believes more rulemaking is really the only way to go) through the rulemaking listed on the agency's December 20, 2010, Regulatory Agenda entitled "Safety and Health Management Programs for Mines." 75 Fed. Reg. 79,589. Indeed, in that

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[12] Even the UMWA recognizes the legitimacy of this request in its comments on the proposed rule, where it states:

> [W]e think it would improve the rule, if it made clear that MSHA would not write citations based on violations that an operator's examiner identified, so long as appropriate abatement efforts are made. That is, the fact that a violation once existed should not give rise to a citation if the operator addresses it once it is identified. Making this clarification would eliminate concerns some operators expressed.

United Mine Workers of America, Comments on the Mine Safety and Health Administration's Proposed Rule: Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards, "RIN 1219-AB75" at 3.

[13] *See also*, Assistant Secretary Mains' March 3rd testimony: "The [Upper Big Branch] disaster highlighted the need to ensure that mine operators take seriously their *obligation to find and fix the hazards in their mines, even when MSHA is not looking over their shoulders*." Statement at 13 (emphasis added). MEC wholeheartedly agrees with this statement and that is precisely what the current mine examination rules require.

Regulatory Agenda, this rule (yet to be proposed) is specifically identified as a "complement" to the subject proposal. *Id.*

For all the reasons identified in this section of our comments, the proposal should be withdrawn.

The Proposal Would Violate a Number of the President's Executive Orders and Memoranda on Rulemakings, Including the Requirements for an Accurate Regulatory Economic Analysis of the Proposed Rule

Piling on the responsibilities of mine examiners in the manner the proposed rule would demand is unwise for all of the reasons noted, and contradicts the spirit, if not the letter itself, of President Obama's new Executive Order ("E.O.") 13,563, "Improving Regulation and Regulatory Review," which stresses the desire of this Administration to regulate industry in the least burdensome manner and to take into account "the costs of cumulative regulations." *See* 76 Fed. Reg. 3,821 (Jan. 21, 2011). E.O. 13,563 also directs, in § 6 (*id.* 3,822), each federal agency to develop a preliminary plan and submit it to the Office of Information and Regulatory Affairs within 120 days of January 21, 2011, under which the agency will periodically review its existing significant regulations to determine whether any of them "should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives." *Id.*

MEC strongly recommends that, in light of all the new regulatory requirements that have been imposed on the underground coal mining industry since enactment of the MINER Act in June 2006, most of which required complex, technology-forcing, and costly new mandatory safety standards, as well as the new mandatory standards both promulgated, proposed, and contemplated by the Agency's current regulatory agenda since this Administration took office in January 2009, that the time is more than ripe for MSHA to carry out the review required by E.O 13,563. We respectfully request, pending this review, that a moratorium on new MSHA regulations be instituted; and, specifically, that this current proposal not only not be promulgated pending preparation of that cumulative regulatory review, but also that the comment period on this proposal be reopened for additional public input following the preparation and publication of that review. MEC also urges that public comment be solicited on the cumulative regulatory review itself.

With regard to the analysis offered in the preamble in connection with E.O. 12,866, "Regulatory Planning and Review," MEC submits that the Secretary's rationale in the "Benefits" section of the preamble is extremely poorly reasoned. According to the Secretary, the proposed rule could have prevented nine mine fatalities between 2005 and 2009. *See* 75 Fed. Reg. 81,169. But a parsing of the underlying rationale belies that conclusion. First, the Secretary looked at 15 fatalities that stemmed from situations in which the operator was cited for violating one of the examination rules. *See id.* The Secretary states "these fatalities involved hazardous conditions and should have been prevented by a proper examination in accordance with the existing standards," but, unfortunately, "the mine examiners did not identify the conditions as being hazardous prior to the fatal accidents." *Id.* We submit the problem, therefore, was improper examinations under the existing rules. It does not justify the proposed requirement to identify

and correct all violations of mandatory health or safety standards, regardless of whether those violations pose a hazard.

The preamble goes on, however, to note that MSHA found violations of mandatory standards (other than the improper examination itself) in nine of those 15 fatality cases. *See id.* This, according to the Secretary, shows that the proposed rule could have saved those nine lives. But this is pure sophistry. The problems in each case, according to the Secretary herself, were the hazardous conditions, and the hazardous conditions were something that the examiners in those cases were required to spot and correct under the existing rules. Moreover, assuming for the sake of argument that the examiners in those cases truly did fail to perform as required under existing law, the Secretary cannot say – nobody can – that had those hazards been spotted and corrected, the resulting fatalities could not have been prevented. The Secretary is posing speculation as fact to support her proposed rule, but the logic is not there to support it.

Nor is the logic – or, indeed, any facts at all – there to support the Secretary's opinion that three additional deaths could have been prevented during the same five-year period had her proposed rule been in place. *See id.* The preamble states that the Secretary reviewed fatal investigation reports not stemming from improper examinations, and that she also reviewed 10 health and safety standards that are frequently the most-cited standards. It then states, without any analysis or additional information, that "[b]ased upon the Agency's review of these reports, MSHA determined that three additional fatalities could have been prevented by the proposed rule by identifying violations of mandatory health or safety standards and making necessary corrective actions." *Id.* But why? This is a hollow claim – unsubstantiated and conclusory. What is it about those fatality reports and those standards that lead to this conclusion? The preamble does not explain the Secretary's conclusion or provide any basis for public or judicial review of the Secretary's claim.

The bottom line is that the Secretary is using past examples of alleged improper examinations to support her opinion that the examination rules need to be changed, but the conclusion does not follow the premise. Examinations are not always properly executed. Indeed, the failure to conduct a proper examination is one of the most frequently cited violations by MSHA. Improper examinations can pose a serious safety risk to miners, and operators should take all necessary steps to correct the problem, whether it is more training, discipline, or hiring new personnel. But that the examination rules are not always properly followed does not mean that the examination rules are inherently flawed, and it is a fallacy that the only way to correct violations of existing regulations is to issue more regulations.

MEC filed a Freedom of Information Act ("FOIA") request on March 17 to obtain copies of the MSHA reviews and analyses of the 15 fatality reports mentioned in the preamble to this proposal at 75 Fed. Reg. 81,169. *See* Attachment. To date, MSHA has not responded to this request for the analyses, despite the closing of the comment period, and has not extended the comment period in order to allow MEC or the industry to review these analyses.

Therefore, MEC has conducted its own independent review of the 11 fatality reports contained at MSHA's on-line single-source page for this rulemaking, which can be found at http://www.msha.gov/MineExams/MineExams.asp. Based on this analysis, it is overwhelmingly

clear to MEC that MSHA concluded in each case that if the hazardous conditions that contributed to the root cause of these accidents had been properly identified and corrected, the fatalities would not likely have occurred. Adding a requirement to identify a "violation" in addition to a "hazard" would have merely been duplicative and would not have prevented any of the fatal accidents upon which MSHA relies to justify the benefits of this proposed rule. To summarize MEC's independent review of those reports:

Fatal Accident #1: Harmony Mine. According to MSHA's fatality report, the Acting Section Foreman was ignoring the roof control plan at the time the accident occurred, and directing other miners to do the same. The foreman "either did not recognize the *hazardous* [roof] conditions that were present during his examinations or chose to ignore them." (Emphasis added.) Adding a requirement to look for violations would not have saved this foreman who chose to stand under unsupported roof.

Fatal Accident #2: Maverick Mining Company, LLC – Mine #1. As MSHA's accident report concludes, "The accident resulted from *failure to identify hazards*." (Emphasis added.)

Fatal Accident #3: Aracoma Alma Mine #1. According to the conclusions of MSHA's accident report, numerous causes contributed to the fire and deaths, including the failure of the AMS operator to withdraw miners until almost a half hour after the the AMS generated a CO alarm signal. According to MSHA's fatality report, the contributory factor of stoppings that had been removed without installation of proper ventilation air locks should have been identified during an examination as a hazard: "Examinations of the mine were inadequate and failed to identify the lack of separation between the primary escapeway and belt air course."

Fatal Accident #4: Jacob Mining Company LLC – No. 1 Mine. As MSHA's fatality report concludes, "A pre-shift examination for *hazardous* conditions was not conducted, which, if conducted properly, *would have identified* and corrected the improperly installed roof supports." (Emphasis added.)

Fatal Accident #5: Tri Star Coal L.L.C., No. 1. As MSHA's fatality report states, "The accident occurred because mine management failed to ensure adequate examinations were being conducted to identify and correct *hazardous roof conditions*." (Emphasis added.)

Fatal Accident #6: Sycamore Mine No. 2. While the fatal accident report says "[n]o hazardous conditions were reported" during the preshift and on-shift examinations, the report makes no indication that the hazardous conditions or any violations existed at the time the examinations were conducted. Rather, the report concludes that, "[t]he accident resulted from failure to follow an existing procedure for maintaining haulageways free of extraneous material and a lacking procedure or policy requiring physical protection for scoop operators." Thus, even assuming the extraneous planking material was in the haulageway when the previous examinations occurred, it should have been recognized as a hazard.

Fatal Accident #7: Jim Walter Resources, Inc. – No. 7 Mine. As MSHA's fatality report concludes, "The accident occurred because the miner traveled in an area where *hazardous* roof

conditions were present due to the deterioration of the mine roof and installed roof support." (Emphasis added.)

Fatal Accident #8: Rockhouse Energy Mining Company – Mine #1. As MSHA's fatality report states, "*Hazards* existing in roadways and travelways were not identified during mine examinations." (Emphasis added.) Alternatively, the hazard might not have existed when the examination was conducted. Either way, hunting for violations would have been duplicative of hazard identification.

Fatal Accident #9: South Central Coal Company, Inc., South Central Mine. According to MSHA's fatality report, the accident victim was traveling in an area of unsupported roof, which is a hazard. Also, "[d]ue to the *hazardous condition* noted and the accumulation of water . . . an additional examination for safety purposes should have been made to check for correction of the *hazardous conditions* prior to the breakthrough into the unsupported area. This additional examination was not made." (Emphasis added.)

Fatal Accident #10: Tracy Lynne Rosebud Mining Co. According to MSHA's fatality report, the accident occurred as a result of the operator's failure to address the "obvious defective roof condition," which was a hazard that should have been reported, but rather "*hazardous conditions* were not addressed or recorded in the preshift record book." (Emphasis added.)

Fatal Accident #11: NEWCO #1 Mine Sunrise Coal Company, LLC. According to MSHA's fatality report, the accident occurred because the operator failed to recognize the presence of a drag fold (horseback) in the roof. This adverse roof condition represented a hazard when not properly dealt with that should have been addressed by the existing examination regulations.

In summary, although MSHA has failed to turn over its analysis of these fatal accident reports, MEC's review of those reports show that MSHA concluded for each that either (a) the existing examination regulations could and should have prevented the noted accidents had the operators complied with those examination regulations through both identifying and actually correcting hazards, or (b) some of the hazards may not have even been present when the previous examination(s) occurred. Thus, adding a requirement to examine for violations of mandatory safety or health standards (including non-hazardous violations) would not have prevented these fatalities.

MEC also believes that the analysis of benefits contained in the preamble is greatly overstated; and that the compliance costs are vastly understated. The benefits-costs analyses poorly account for the impact of the proposed rule on production, and totally fail to consider that many mines operate at full capacity.

In conclusion, MEC appreciates the opportunity to comment on this proposal. We urge that the proposed rule be withdrawn.

Sincerely,

Edward M. Green
Daniel W. Wolff

Counsel for Murray Energy Corporation

Attachment

1001 Pennsylvania Avenue, NW, Washington, DC 20004-2595 ▪ p 202 624-2500 ▪ f 202 628-5116

crowell moring

Edward M. Green
202-624-2922
egreen@crowell.com

March 17, 2011

1079:llf

FREEDOM OF INFORMATION ACT REQUEST

Via Fax and Email

April E. Nelson
Acting Director
Office of Standards, Regulations, and Variances
Mine Safety & Health Administration
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

Re: Freedom of Information Act Request re Analysis of 15 Fatalities Described in the Preliminary Regulatory Economic Analysis for 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. Nelson:

Further to our exchange of emails on March 15 and 16, 2011 (copy enclosed), the purpose of this letter is to request, pursuant to the Freedom of Information Act, a copy of the "Analysis of the 15 Fatalities" identified in MSHA's preliminary regulatory economic analysis ("PREA") published in the *Federal Register* for December 27, 2010 as part of the preamble for the Agency's proposed rule on "Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards." 75 Fed. Reg. 81165, 81168.

More specifically, at 75 Fed. Reg. 81169 in the "Benefits" portion of the PREA, MSHA states that to estimate the potential benefits of the proposed rule:

> MSHA reviewed all 64 fatal accident investigation reports from 2005 through 2009. . . .
>
> Over the five year review period, there were 91 fatalities in underground coal mines. Of this total, the investigation reports for 15 of the fatalities specifically listed violations of the preshift, supplemental, on-shift, or weekly examinations as contributing factors to the accidents . . . . *After analysis of the 15 fatalities* MSHA determined that nine of them involved violations of mandatory health or safety standards and could have been

> prevented by a proper examination in accordance with the proposed rule.

(Emphasis added).[1]

While appreciating the assistance provided me in our exchange of emails, the preamble language of the PREA specifically refers to an "analysis of the 15 fatalities." Unless that analysis, like the Goddess Athena sprang from the forehead of Zeus, MSHA documents must exist supporting what would otherwise be unsupported and purely conclusory statements in the preamble. This FOIA request seeks to obtain the "analysis of the 15 fatalities" specified at page 81169 of the *Federal Register* publication of the proposed rule, and all MSHA documents prepared in development of this analysis.

In light of the current March 28 deadline for submittal of comments on this proposed rule, and because we believe the documents requested herein are readily retrievable by your office, *we ask that you expedite this FOIA request.* We also wish to renew the request I made in our email exchange for anextension of the comment period until 15 days after you furnish to me the document(s) requested inthis FOIA request.

Please send a response to this letter directly to me at the following address:

Edward M. Green
Crowell & Moring LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Should you need to reach me to discuss any aspect of this request, please call me at (202) 624-2922; or email me at egreen@crowell.com.

Sincerely,

Edward M. Green

Edward M. Green

Enclosure

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[1] Of the 64 fatal accident investigation reports mentioned in the preamble, a number of them involved multiple fatalities.

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Green, Edward

From: Green, Edward
Sent: Wednesday, March 16, 2011 2:46 PM
To: Nelson, April E - MSHA
Subject: RE: Reports were on website

Thanks for your help.

From: Nelson, April E - MSHA [mailto:nelson.april@DOL.GOV]
Sent: Wednesday, March 16, 2011 2:33 PM
To: Green, Edward
Subject: RE: Reports were on website

Ed, I answered that question already to the best of my ability. The analysis is explained in the preamble. I need to turn my attention to a number of other pressing issues now.

Sincerely,
April

From: Green, Edward [mailto:EGreen@crowell.com]
Sent: Wednesday, March 16, 2011 2:07 PM
To: Nelson, April E - MSHA
Subject: RE: Reports were on website

OK April re the 12 fatalities. And we will prepare comments. But are you telling me there is no written MSHA analysis as specifically stated in the preamble?

Ed

From: Nelson, April E - MSHA [mailto:nelson.april@DOL.GOV]
Sent: Wednesday, March 16, 2011 2:02 PM
To: Green, Edward
Subject: RE: Reports were on website

Ed, the 11 links contain reports for the 12 fatalities (2 for Aracoma). If you believe that the preamble insufficiently analyzes the fatalities, please feel free to submit a comment to that effect.

Sincerely,
April

From: Green, Edward [mailto:EGreen@crowell.com]
Sent: Wednesday, March 16, 2011 12:34 PM
To: Nelson, April E - MSHA
Subject: RE: Reports were on website
Importance: High

April, thank you for sending me the link. It contains 11 reports of investigation, not 12 (as you specify in your email of yesterday). And, with respect, perhaps you think MSHA's "analysis is explained in the preamble." But that begs the question. I would like to have a copy of the "analysis of the 15 fatalities" (75 Fed. Reg. 81,169) itself so we can review it to see if we agree with the analysis or not--and, if we don't, then we would comment on it.

Thank you for your courteous response to date. I'll look forward to receiving the analysis. Please let me know if you will send it or not.

Best wishes,

Ed

From: Nelson, April E - MSHA [mailto:nelson.april@DOL.GOV]
Sent: Wednesday, March 16, 2011 10:30 AM
To: Green, Edward
Subject: Reports were on website

Hi, Ed. The reports already had been posted on the website as well, on the Exams single-source page. Here's the link. The analysis is explained in the preamble. I don't see a basis for an extension.

http://www.msha.gov/MineExams/MineExams.asp

Sincerely,
April

From: Nelson, April E - MSHA
Sent: Tuesday, March 15, 2011 5:58 PM
To: 'Green, Edward'
Subject: RE: MSHA Analysis of 15 fatalities in the PREA for Proposal on Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards

Good afternoon, Ed. As the preamble mentions, there are actually 12 investigation reports to which MSHA refers in the Benefits section (the 9 you mention, plus three more in which an inadequate examination was not specifically listed as a contributing factor). Also, as the preamble mentions, those reports were in the rulemaking docket at least as early as the date the NPRM was published.

I will see if I can pull them together electronically and e-mail them to you.

Sincerely,
April

From: Green, Edward [mailto:EGreen@crowell.com]
Sent: Tuesday, March 15, 2011 3:45 PM
To: Nelson, April E - MSHA
Subject: MSHA Analysis of 15 fatalities in the PREA for Proposal on Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards

Hello April, I hope all is well with you. I called your office earlier this afternoon to discuss a request I'd like to make in connection with the December 27, 2010 proposed rule on "Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards." 75 Fed. Reg. 81,165. In preparing comments for clients, we have noted that in the Preliminary Regulatory Economic Analysis ("PREA"), contained in the preamble to the proposal itself, the "Benefits" portion of the PREA contains an important discussion of an analysis by MSHA of 15 fatalities. More specifically, the PREA states that out of a total of 91 fatalities reviewed by the Agency, "the investigation reports for 15 of the fatalities specifically listed violations of the preshift, supplemental on-shift, or weekly examinations as contributing factors to the accident." *Id.* 81,169. Furthermore, according to the PREA, "[a]fter analysis of the 15 fatalities, MSHA determined that 9 of them involved violations of mandatory health or safety standards and could have been prevented by a proper examination in accordance with the proposed rule." *Id.*

We think this analysis is a key foundational document for both the PREA and the proposed rule itself. Although we are prepared to send you a formal FOIA letter regarding this analysis, we think that all stakeholders (and the Agency itself) would benefit if MSHA were to take the following two actions:

- make public the analysis and the 9 fatality investigation reports by placing these documents in the rulemaking docket for this proposed rule as quickly as possible; and

- extend the comment period from the current deadline of March 28 to a period ending 15 days after the 9 fatality reports and the MSHA analysis thereof are placed in the rulemaking docket.

In short, we believe that our clients and other stakeholders must be afforded an opportunity to review and comment on the aforementioned MSHA analysis and the 9 underlying fatality reports; and that the opportunity for review and

comment will lead to more effective public input to this important rulemaking. A prompt decision regarding this request will be appreciated.

With regards,

Ed

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