
From: Greg Conrad [mailto:gconrad@imcc.isa.us]
Sent: Thursday, July 28, 2011 3:38 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Subject: RIN 1219-AB75

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Attached please find a copy of comments by the Interstate Mining Compact Commission regarding MSHA's proposed rule on Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards published on December 27, 2010 at 75 Fed Reg 81165. A hard copy of the comments has been faxed to MSHA and also placed in U.S. Mail. Should you have any questions or require additional information, please do not hesitate to contact me.

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AB75-COMM-25

July 28, 2011

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

Re: Docket No. RIN 1219-AB75

Dear Ms Fontaine:

This letter is submitted on behalf of the Interstate Mining Compact Commission (IMCC) concerning a proposed rule regarding Examinations of Work Areas in Underground Coal Mines published by the Mine Safety and Health Administration (MSHA) on December 27, 2010 at 75 Federal Register 81165. The comment period on the proposed rule was recently extended until June 30 via notice at 76 Federal Register 25277. IMCC is a multi-state governmental organization representing the natural resource, environmental protection and mine safety and health interests of its 24 member states. Many of IMCC's member states either operate their own mine safety and health regulatory programs or carry out training and certification responsibilities pursuant to the federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006.

In this proposed rule, MSHA proposes to revise its requirements for pre-shift, supplemental, on-shift, and weekly examinations at underground coal mines by requiring operators to identify violations of mandatory health or safety standards in addition to the existing requirement to identify conditions that pose a hazard to miners. The proposal would also require that the mine operator record and correct violations and review with mine examiners on a quarterly basis all citations and orders issued in areas where these examinations are required. MSHA's stated purpose for the proposed rule is to assure that underground coal mine operators find and fix violations of mandatory health or safety standards and record corrective actions, thereby improving health and safety for miners.

State mine safety and health agencies share many of the goals and objectives articulated in MSHA's proposal, particularly improving health and safety for miners. Several of our member states operate robust mine safety

and health programs that have as part of those programs requirements for the certification of mine personnel, including those who examine underground coal mines. As such, we have a vested interest in the purpose and potential implementation of MSHA's proposed rule for mine examinations.

Our overarching concern with respect to any proposal addressing certification programs is the impacts that it could have on the existing role of state governments pursuant to their respective regulatory programs. Numerous states have comprehensive mine safety and health programs that address, among other things, inspection of mining operations, enforcement of state mining laws, and certification and training of mine personnel. Many of these state programs pre-date federal mine safety laws and in some cases are more stringent than their federal counterpart.

In the area of certification of various competencies that attend the operation of coal mines, the states have always taken the lead pursuant to their own programs and as anticipated and authorized by sections 318, 502 and 503 of the Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006. And while there are differences among the states in how they address certification, recertification, decertification and reciprocity, this aspect of the overall mine safety and health statutory and regulatory scheme has consistently worked well. We are not aware of any instances in the past where the states' implementation of their certification programs has been criticized for ineffectiveness or inadequacy.

MSHA indicates in the preamble to the proposed rule (on page 81167) that it "does not intend that the proposal would significantly change the general scope of examinations under the existing standards." However, we believe that the proposed changes would have exactly that effect with respect to the nature of the examinations, the length of time required for the examinations, and the consequences for mine examiners (and potentially state agencies who certify examiners) when violations of mandatory health or safety standards are missed.

For instance, MSHA states that one of the intended results of the proposed requirements is that conditions which might have been identified only by MSHA inspectors would now be found and corrected by coal operators (via mine examinations). While we agree that there is value in motivating mine operators to be more proactive in creating a culture of safety at coal mines, MSHA's approach fails to recognize the competencies and training required of mine examiners under current state laws and regulatory programs. Mine examiners do not receive the level of training anticipated by this rule, which would essentially convert them into shadow inspectors.

In order for MSHA to accomplish its intended purpose under the proposal, state certification programs would have to be significantly restructured and both current and new examiners would have to undergo enhanced training and testing to insure that they can meet the new standard of identifying all violations of mandatory health or safety standards. The attendant time periods associated with each of the impacted examinations (pre-shift, on-

shift, weekly and supplemental) would also need to be adjusted to allow enough time for examiners to undertake the expanded responsibilities associated with the rule. MSHA's "benefits" analysis pursuant to Executive Order 12866 estimates that the additional amount of time that will be required under various examinations to identify violations of mandatory health or safety standards would be 30 minutes for pre-shift examinations and 15 minutes for on-shift, supplemental and weekly examinations. We are uncertain what "data and experience" MSHA relied upon for these calculations, but we suspect that they are hugely understated.

Regardless of the time factors involved, the larger concern for the states is the consequences for mine examiners, and by extension the states who certify them, if MSHA moves in this direction. Some states are already seeing mine examiners requesting to be decertified because of concerns associated with heightened expectations related to identifying all violations of mandatory health or safety standards. In some cases, this is a matter of not being adequately trained to identify these violations. In others, it is not having enough time during the course of their examinations to find all violations. And in every case, it is a matter of the examiners' integrity, credibility and potential personal liability being on the line. We expect that these concerns will be heightened if MSHA adopts this rule in final form. MSHA specifically states in the preamble to the rule that it "would require that certified mine examiners conduct more complete and thorough examinations." Such a mandate will require appropriate adjustments to training, certification and examination time periods, routes and follow up. It also leads directly to the concern about personal liability.

There is also the larger question of whether an emphasis on finding all violations of mandatory health and safety standards will result in an examiner being distracted from focusing on critical areas so as to identify conditions that pose *hazards* to miners. On at least two occasions (in 1992 and 1996) MSHA chose not to include a requirement that mine examiners check for violations of mandatory health or safety standards because of the impacts this would have on the examiner's primary duty of identifying hazardous conditions. As MSHA once again contemplates moving in the direction of requiring examiners to identify all violations of mandatory health and safety standards, the agency must not only address the impact on hazard identification, but also the concerns raised above regarding training and certification requirements, liability concerns, and the willingness of miners to serve as examiners under the circumstances. If these rules become too onerous, they could become a huge disincentive for persons to serve as examiners, thereby placing the health and safety of miners at risk. It may have been these very considerations that caused MSHA to abandon this approach in past years.

MSHA should also take into consideration the impacts that this rule could have on state certification programs, both in terms of costs and continued viability of the programs. Should MSHA expand the duties of mine examiners as proposed, it will be incumbent on those states who certify these examiners to insure that they can meet and accomplish these new requirements in an effective manner. To do anything less than this could subject the state to potential liability for inadequate certifications. State budgets are already strapped in terms of costs associated with training and certification programs. Thus, depending on the

nature and extent of the enhancements that states must undertake to meet these new requirements, additional support in the way of training grants from MSHA may be required.

In this regard, we disagree with MSHA's finding pursuant to Executive Order 13132 that the proposed rule does not have "federalism implications" for the states because it will not have substantial direct effects on the states. We believe the rule will have distinct and real implications for the states in the way of costs associated with training and certification, some of which could be substantial. We request an opportunity to pursue this aspect of the rule further with MSHA so that we can assure ourselves that adequate resources will be available to meet any new mandates. Otherwise, we may find ourselves in the position of having our certification programs challenged for being ineffective or incomplete. Such a result would be inappropriate and untenable under the circumstances. Again, the states have consistently operated first-rate certification programs and we do not want to see those programs jeopardized by an overlay of new requirements that cannot be addressed without adequate resources.

Finally, the states want to make it clear that we are committed to high quality performance by all mine examiners within our borders. Where blatant poor performance through missed, incomplete or inadequate examinations is an issue, the states are prepared to take action through their respective program requirements. Investigations of these types of occurrences are routinely initiated and where poor performance or negligence is established, the state will immediately de-certify the examiner or suspend the certification. We believe that in the final analysis, this state review and decertification process is where the biggest difference can be made in terms of complete and adequate examinations, quality examiners and protection of miners. Whatever the eventual requirements are for mine examinations, the key to success is an effective certification program at the state level, and we remain committed to the integrity and effectiveness of those programs.

We appreciate the opportunity to submit these comments. Should you have any questions or require additional information, please do not hesitate to contact us.

Sincerely,

Gregory E. Conrad
Executive Director