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*Via Facsimile and Electronic Mail  
To zzMSHA-Comments@dol.gov*

February 24, 2011

Mine Safety and Health Administration  
Office of Standards, Regulations and Variances  
1100 Wilson Boulevard, Room 2350  
Arlington, VA 22209-3939  
Facsimile: (202) 693-9441

**RE: RIN 1219-AB75  
EXAMINATIONS OF WORK AREAS IN UNDERGROUND COAL MINES FOR VIOLATIONS  
OF MANDATORY HEALTH AND SAFETY STANDARDS**

Dear Sir or Madam:

Alliance Coal, LLC ("Alliance") hereby submits the following comments on the rules MSHA proposed on December 27, 2010, revising the requirements for pre-shift, supplemental, on-shift, and weekly examinations of underground coal mines. 75 Fed. Reg. 81165 (Dec. 27, 2010). Under the existing standards for these types of examinations, operators are required to identify, correct, and record hazardous conditions. Respectfully, MSHA's proposed rule would drastically alter the requirements of examinations for the worse, causing mine examiners to engage in such an obscenely detailed approach to examinations that it could cause many of them to fail to see the proverbial forest for the trees and, as a result, the end result potentially could be mines that are less safe than they are today.

The subsidiary mining operations of Alliance operate 10 mines across Indiana, Illinois, West Virginia, and Kentucky. These mining operations, altogether, produce approximately twenty-nine (29) million tons of bituminous coal each year, through the use of both longwall and continuous miner methods. Preshift, onshift and weekly examinations are all performed by certified officials. In fact, these certified mine officials are trained to conduct examinations pursuant to federal law and the comprehensive state statutes applicable to the each mining operation. The state mine safety statutes often have requirements that differ and/or add substantively to the examination requirements contained within 30 Code of Federal Regulations ("C.F.R.") Part 75.



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Under MSHA's proposed rule, mine examiners would be required to identify any and all violations of mandatory health and safety standards during the course of their examination duties, in addition to those same mine examiners identifying the types of hazards they are currently required to identify under existing regulation. 75 Fed. Reg. at 81165. Moreover, the proposed rule requires mine operators to also record and correct any violations discovered during examinations, note all actions taken to correct the such violations, and review with mine examiners (e.g., mine foreman, assistant mine foreman, or other certified persons) on a quarterly basis all citations and orders issued in areas where preshift, supplemental, on-shift, and weekly examinations are required. 75 Fed. Reg. at 81165. Respectfully, we believe the requirements proposed are entirely inappropriate and should be withdrawn by the agency.

According to the Notice of Proposed Rulemaking, MSHA claims it has no intent to significantly change the general scope of examinations under existing standards. Indeed, MSHA claims the proposed rule would not require mine examiners to perform additional tests, take additional measurements, or open and examine equipment and boxes. MSHA also claims mine examiners will identify violations of MSHA's ten (10) most frequently cited standards; that is what mine examiners will be expected by MSHA to find. Unfortunately, however, the proposed rule does not specify such limitations and the mining community has absolutely no reasonable expectation that MSHA's inspectors will interpret such a rule, once promulgated, in such a limited fashion.

As proposed, the rule requires mine examiners to look for, and identify, all violative conditions, even if said conditions do not pose a discrete safety or health hazard to miners. Simply put, Part 75 is a comprehensive and extensive regulatory compilation. Yet extensive experience with MSHA's current enforcement teams leads to the confident belief that for every citation written for an obscure, technical and/or minor violation of the extensive number of intricate mining safety and health regulations, a mine operator should fully expect to receive an additional citation for an alleged failure to perform an "adequate" examination of the mine.

Fundamentally, the proposed rule seeks to change how examinations are conducted and, in the process, the proposed rule unreasonably raises the expectations, responsibilities and duties of a mine examiner. The rule places an impossible burden upon persons who perform these examinations and, in short, is unrealistic. More significantly, the proposed rule will divert mine examiners from focusing their inquiry on truly serious conditions, as they attempt to cover their bases on the mundane and



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the minutiae that MSHA inspectors can find through more prolonged inspections. Mine examiners are not trained as inspectors. Rather, they are trained as mine examiners—skilled at recognizing legitimate hazards from a practical and real world point of view. Indeed, mine examiners are trained by state agencies, not MSHA, and none of the states require examinations to identify every violative condition that may exist in an underground coal mine.

This is not the first time that a proposed rule has sought to include identifying and recording noncompliance with mandatory safety and health standards during examinations. In 1996, a similar proposal was made to require mines to report all noncompliance with mandatory safety and health standards, under 30 C.F.R. § 75.364. 61 Fed. Reg. 9764, 9806 (March 11, 1996). This proposal, however, drew considerable objection and was not adopted in the final rule. 61 Fed. Reg. at 9806.

At that time, MSHA stated:

*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. 61 Fed. Reg. at 9806 (emphasis added).*

MSHA concluded at that time that the existing standard was appropriate and best served the objective of giving examiners clear guidance for making effective examinations. 61 Fed. Reg. at 9806. Even then, the 1996 proposal would have limited the scope of examinations for non-compliance to situations that “could result in a hazardous condition.” Here, no such limitation exists in the proposed rule. In fact, MSHA makes clear that a violation that does not pose a hazard to miners would have to be recorded, corrected and the corrective actions taken to be recorded, as well. 75 Fed. Reg. at 81167. In other words, today MSHA is proposing a regulation even broader than a policy MSHA, itself, determined would do more harm than good fifteen (15) years ago.

In any case, and similar to the former proposal, the current proposed rule still detracts from the purpose of conducting examinations. It requires certified examiners to act as MSHA inspectors despite the lack of inspector training. In the preamble, MSHA asserts that the top 10 standards cited by MSHA are “the types of violations that well-trained and qualified examiners can observe while conducting effective examinations.” 75 Fed. Reg. at 81167. But the practical reality is that those standards are rarely clear cut, often hinging on subjectivity in their interpretation and practical



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application. Section 75.400, the most frequently cited standard, is a catch-all standard which can address everything from "paper thin" coal accumulations along conveyor belt to a piece of trash along a travelway. Likewise, roof control and ventilation plans are very broad. Section 75.202(a), 75.1725(a), 75.503 and 75.512 are broad general standards that involve exercises in judgment, without the availability of a clear cut standard upon which an MSHA inspector, let alone a mine examiner, can rely. When compounded with the fact an underground coal mine is not a static environment, violative conditions could—and would—be missed by mine examiners without fault, negligence, or intent. The result, however, would be additional citations and civil penalties to a mine operator simply for operating an underground coal mine.

Ironically, the preamble refers to Section 75.403, the rockdusting standard, which is not in the top ten most cited standards and usually requires actual sampling to determine compliance with the law. Apparently, however, MSHA believes with this proposed rule that mine examiners—in addition to doing the job of an MSHA inspector—are clairvoyant enough to predict the precise results of rock dust sampling, which an MSHA inspector will then have the benefit of when he or she follows behind to check on the mine examiner's performance.

Again, the proposed rule appears designed to provide the agency an avenue to be over zealous in their enforcement scheme by allowing MSHA inspectors to write additional citations based upon what is and is not in the mine's record books. To a certain extent, mine operators already see this type of behavior from MSHA inspectors now. With the changes of this proposed rule, however, this practice potentially will become an every day occurrence. **Inspectors will write citations based simply and solely upon what mine operators record in their books.**

Section 104(a) of the Mine Act states in part that: "If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." (emphasis added). Based on the strict language of the Mine Act, the inspector will not be able to accept the mine operator's diligence in finding and



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correcting a violation of a mandatory standard and, instead, may have little choice but to issue a violation under Section 104(a) of the Mine Act. Such enforcement techniques are antithetical to the real purpose of mine examinations, which is to identify actual hazards so that miners are not injured.

MSHA issued more than 198,000 violations in 2008, more than 173,000 in 2009, and more than 150,000 in 2010. Under the proposed regulation, the MSHA inspector could have also alleged a large number of "inadequate examination" violations, whether it be from violations not appearing in the mine's records books (i.e., discovered by an inspector) or the condition appearing in the books, but not yet corrected by the mine operator during the course of continued normal mining operations. Either way additional citations would result, regardless of how diligently the mine examiner performed his or her task.

Finally, we reviewed the accident and injury reports posted on MSHA's single source page for this proposed rule. Fundamentally, we disagree with MSHA's conclusion that the majority of injuries would have been prevented by examinations that identified violations as opposed to hazards. In fact, even a cursory review of MSHA's reports reveals a number of important points—none of which support promulgation of this proposed rule. First, the reports demonstrate a failure in many instances to recognize a hazard, not simply a violation. For example, a failure to recognize the hazard of a drag fold (horseback) in the case of Sunrise Coal. Second, other situations involved citations where the hazard was identified, but not properly addressed, such as the case of Rosebud Mining. Third, some situations involve a failure to conduct an adequate examination for hazards, such as Aracoma Coal. Fourth, some of the situations involve mining equipment and decision making, where the injuries were not the result of examinations at all. One such example is the South Central Coal case where a miner went in by roof support. Fifth and finally, MSHA's approach fails to take any accountability of MSHA's own failures to protect our nation's coal miners. For example, Internal Reviews conducted by MSHA following the Jim Walters Resources explosion in 2001 and the fatal mine fire at Aracoma Mine in 2006 both revealed significant deficiencies in MSHA's own inspection activities. In that regard, providing MSHA inspectors with a rule that allows them to check a mine's record book to find a requisite number of citations "sufficient" to justify their oversight obligations seems irresponsible, as well.

We would urge the agency to reconsider this proposed rule and to act as it did in 1996 (i.e., do not promulgate this proposed rule), particularly given the proposed rule's



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lack of specifics which will only undermine the current system of examinations which focuses with precision upon identifiable hazards to the safety and health of miners.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary D. McCollum".

Gary D. McCollum, Esq.