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November 26, 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: Comments of Murray Energy Corporation on MSHA's Proposed Rule,
"Proximity Detection Systems for Continuous Mining Machines in
Underground Coal Mines"; RIN 1219-AB65; 76 Fed. Reg. 54,163
(Wed. Aug. 31, 2011)**

Dear Ms. Fontaine:

Murray Energy Corporation (hereinafter "Murray Energy") hereby offers the following comments to the Mine Safety and Health Administration ("MSHA") concerning its proposed rule, "Proximity Detection Systems for Continuous Mining Machines in Underground Coal Mines," ("Proposed Rule" or "Proposal"), published in the Federal Register for August 31, 2011, 76 Fed. Reg. 54,163. The Proposal would amend Part 75 of Title 30 of the Code of Federal Regulations by adding a new §75.1732, "Proximity Detection Systems."

Background and Introduction

By way of brief background, Murray Energy is the largest privately-owned coal company in America, producing approximately 30 million tons of bituminous coal annually that provides affordable energy to households and businesses across the country. Murray Energy's subsidiaries operate eight underground and surface mining operations in southern Illinois and southern Ohio, western Kentucky, and Utah, plus 40 subsidiary and support companies. Transporting coal via truck, rail and waterways, Murray Energy operates the second-largest fleet of longwall mining units in the country. With a support team of 4,300 plus hard-working, dedicated, and talented employees, Murray Energy's affordable high-quality coal is mined safely and efficiently, and is supplied to leading producers of electricity, both domestically and abroad. Murray Energy's committed management team and work force are dedicated to providing and maintaining a safe work environment at all of our facilities.

AB65-2COMM-22

Seven of our coal mining operations are underground mines, which, in turn, utilize forty one (41) continuous mining machines covered by the Proposed Rule.¹ All of these machines would have to be retrofitted with proximity detection systems if the Proposal were to be promulgated. Having examined the Proposed Rule carefully in the context of our underground coal mining operations, Murray Energy is terribly disappointed in its unrealistic, impractical, and technologically infeasible mandates, as we shall discuss further below. Even assuming that MSHA has correctly identified the problem it describes in the preamble to the Proposed Rule and in its "Preliminary Regulatory Economic Analysis" ("PREA") (and Murray Energy has significant doubts about the accuracy of MSHA's analysis, as we will also discuss below), the Proposal goes far beyond what is reasonable in addressing any problem that may exist. In particular, Murray Energy vigorously disagrees with the compliance deadline that MSHA has proposed for existing continuous mining machines that would be subject to the Proposed Rule. Even more importantly, we have grave reservations about the safety and effectiveness of currently available proximity detection systems.

Therefore, based on our analysis of the Proposed Rule and our examination and understanding of currently available proximity detection systems, Murray Energy is opposed to any mandate for use of these systems on existing or new continuous mining machines until MSHA can assure us and other stakeholders that the systems are safe and effective. We urge this Proposed Rule be withdrawn. In that regard, our detailed comments follow.

MSHA's Proposed Compliance Deadlines are Confusing, Unrealistic, Impractical, and Infeasible

To begin, MSHA's proposed compliance deadlines are confusing, to say the least. MSHA cannot seem to get right what it is proposing with regard to compliance deadlines. Our "best guess" is that the Agency has attempted to propose that continuous mining machines covered by the Proposed Rule and manufactured after the publication date of a final rule in the Federal Register would have to be equipped with proximity detection systems by three months from such publication date. As for covered continuous mining machines in use prior to the publication date of a final rule in the Federal Register, these would have to be equipped with a proximity detection system no later than 18 months following such publication. We say this is our best guess because that comports with TABLE 1—PROPOSED RULE COMPLIANCE DATES in the preamble to the Proposed Rule.² However, right above the Table, with regard to continuous miners currently in use, the preamble states: "By *February 28, 2013* for continuous mining machines . . . manufactured on or before *August 31, 2011*." (Emphasis added.)³ Furthermore, in the section-by-section analysis of the Proposed Rule, the preamble states: "Proposed § 75.1732 (a) would require operators to equip [covered] continuous mining machines

¹ The Proposal does not cover full-face continuous miners. See, e.g., 76 Fed. Reg. 54, 163.

² *Id.* 54,164.

³ *Id.*

... with a proximity detection system in accordance with the following dates: *3 months after August 31, 2011 for machines manufactured after August 31, 2011; and 18 months after August 31, 2011 for machines manufactured on or before August 31, 2011.*" (Emphasis added.)⁴ Compounding this confusing preamble is the Proposed Rule itself. Thus, proposed § 75.1732 (a) contains a *chart that shows covered machines manufactured after August 31, 2011 must comply by November 30, 2011; and machines manufactured on or before August 31, 2011 must comply by February 28, 2013.*⁵

Using the *date of publication in the Federal Register of the Proposed Rule* as the basis for a compliance schedule cannot possibly be correct, or what the Agency intended. Such a choice would mean the compliance deadline began to toll on the date of the Proposed Rule's publication in the Federal Register! Such an outcome would make a mockery of this public comment process. Trying as best we can to figure out what MSHA is really proposing, our aforementioned "best guess" is based on our conclusion that perhaps this confusion has arisen because the Agency, as we understand it, had been planning to issue the Proposal as an "emergency temporary standard," under § 101 (b) of the Federal Mine Safety and Health Act of 1977, amended (the "Mine Act").⁶ An emergency temporary standard would have taken effect immediately. That authority was apparently rejected during pre-publication review by the Office of Management and Budget's ("OMB") Office of Information & Regulatory Affairs ("OIRA"), a rejection with which Murray Energy wholeheartedly agrees. Consistent with this assessment, we note that the preamble also provides that the Proposed Rule "would phase in the use of proximity detection systems on newly manufactured continuous mining machines and continuous mining machines in service on the publication date of the final rule *over an 18-month period.*"⁷

Murray Energy finds it astonishing that even as of the date of this letter, as the public comment period expires, MSHA has failed to correct this fundamental mistake. This truly crucial lapse leads us to wonder if anyone at the Agency even reads what is about to be published in the Federal Register—or, for that matter, reads Federal Register documents after they are published.

The bottom line regarding what we are certain must be an extraordinary error on the part of MSHA, is that in any final rule that MSHA might ultimately publish on the use of proximity detection systems, the Agency must clearly (without mistakes) set forth a compliance schedule for newly manufactured and existing covered machines. Furthermore, and even more critically, MSHA must allow substantially more time than it has proposed (assuming our best guess is correct), especially with regard to those covered continuous mining machines already in use on the date of any publication of a final rule.

⁴ *Id.* 54,166.

⁵ *Id.* 54,179.

⁶ 30 U.S.C. §§ 801, 811 (b).

⁷ *Id.* 54,167.

In that respect, the preamble to the Proposal states: "MSHA recognizes that [existing covered continuous mining machines] . . . will need to be taken out of service for a period of time . . . to allow the installation of [proximity detection systems] during planned rebuilds or scheduled maintenance and would allow mine operators some time to inform and train their workforce on proximity detection systems."⁸ That statement is true enough, but MSHA has grossly underestimated the scope and extent of the problem. Even assuming for purposes of discussion, that proximity detectors could work as the Proposal would require and that they can do so safely (assumptions with which we adamantly disagree), Murray Energy does not believe that the deadline for retrofitting our machines is realistic, practical, or feasible.

In our opinion, existing continuous mining machines should only be retrofitted with proximity detection systems by experts from proximity detection system manufacturer itself and the original equipment manufacturer. In that regard, there are simply not enough skilled personnel available to install proximity detection systems on those continuous mining machines that would have to be retrofitted for the work to be completed during the time proposed to be allowed. Furthermore, as we discuss in more detail below, the requirements for MSHA Part 18 approval of proximity detection systems will overwhelm MSHA's capacities to do so in the time-frames proposed.

Although, Murray Energy believes that it is premature for MSHA to take final action on this Proposed Rule, if it were to be promulgated, Murray Energy recommends that at least 48 months be allowed for retrofitting of covered machines in existence on the date of publication of a final rule in the Federal Register. However, a final rule should not be published under any circumstances until MSHA can assure coal mine operators and coal miners that available proximity detection systems are safe and effective for their intended use—and it is that subject to which these comments next turn.

MSHA has not Demonstrated that Currently Available Proximity Detection Systems are Safe and Effective in Complying with the Proposed Rule

MSHA notes in the preamble that, under the existing requirements of 30 C.F.R. Part 18, proximity detection systems must be tested and approved by MSHA for "permissibility."⁹ According to the preamble, "these approvals are intended to ensure that the systems will not introduce an ignition hazard when operated in potentially explosive atmospheres."¹⁰ The Agency hastens to add, however, that "MSHA's approval regulations under 30 CFR Part 18 do not address how systems will perform in reducing pinning, crushing, or striking hazards."¹¹

⁸ *Id.*

⁹ *Id.* 54,165.

¹⁰ *Id.*

¹¹ *Id.*

Murray Energy must, in no uncertain terms, tell MSHA that it is categorically unacceptable for the Agency to demand that we and other underground coal mine operators purchase and install proximity detection systems for use underground that the Agency itself cannot assure us will protect miners by performing the functions for which they are intended. We are troubled enough by technology-forcing demands from the Congress in the MINER Act that now are becoming problematic.¹² MSHA's insistence on the use of proximity detection systems, however, is not legislatively mandated. The Proposed Rule is an administrative creature of the Agency itself. Murray Energy is tired of being forced by the law to install equipment which supposedly will protect our workforce, while MSHA dodges responsibility for determining whether the equipment will actually work or is safe. Our miners should not be guinea pigs for newly mandated, but unproven safety technology.

If MSHA cannot satisfy itself and assure the entities it proposes to regulate that proximity detection systems will perform as intended, then MSHA must not so regulate. This is particularly the case because MSHA, under Mine Act § 318 (i) has had statutory authority for decades to demand that proximity detection systems and other mandated safety systems work—and work safely. But MSHA has chosen to ignore that authority, shirk its responsibility to ensure that new safety technology which it mandates will actually work—and work safely, and shift the burden to mine operators by insisting on the use of new technology, whether proven to be effective and safe or not. Thus, Mine Act § 318 (i) defines the term “permissible,” as applied to electric face equipment (like continuous mining machines) as equipment that is not only “designed, constructed, and installed, in accordance with” MSHA “specifications” (i.e., Part 18) to “assure that such equipment will not cause a mine explosion or mine fire,” but also that “*the other features of [such equipment] . . . are designed and constructed, in accordance with the specifications of [MSHA], to prevent, to the greatest extent possible, other accidents in the use of such equipment . . .*” (Emphasis added.) 30 U.S.C. § 878 (i).

If MSHA is to demand that continuous mining machines must be equipped with proximity detection systems, then Murray Energy must insist that the Agency exercise its Mine Act § 318 (i) authority and develop specifications (i.e., regulations through notice and comment rulemaking) to assure that these systems are designed and constructed to prevent, to the greatest extent possible, other accidents during their use. Part 18 approval is not enough. MSHA must develop rules that the Agency (or another acceptable entity) can test to in order for the Agency, coal mine operators, and coal miners to be assured that proximity detection systems are safe and effective for their intended use. Until MSHA fulfills its obligation to develop these testing specifications, this Proposal should be withdrawn, or, at least, held in abeyance.

¹² See, e.g., the recently issued Program Policy Letter No. P11-V-17, “Brass Compressed Gas Cylinder Valves and Associated Fittings Used in Refuge Alternatives” and “Equipment Alert – November 4, 2011 2nd Update on Failure of High Pressure Gas Fittings and Valves in Refuge Alternatives.” In addition, we continue to experience substantial problems with the effectiveness of MINER Act-mandated electronic tracking and communications systems.

Even MSHA's reliance on 30 C.F.R. Part 18 presents daunting problems. The preamble to the Proposal "estimates that there are 1,150 place-changing continuous mining machines in underground coal mines . . . [which] would need to be replaced by a new machine with a proximity detection system or retrofitted with a proximity detection system. . . [within] 18 months. . ."¹³ All of these machines, as well as the proximity detection systems installed on them must be approved as permissible under Part 18. The preamble also notes that either machinery manufacturers with Part 18-approved continuous mining machines may "apply to MSHA's Approval and Certification Center ["A&CC"] to add a proximity detector to their approval . . . or the mine operator has the option to apply for a field modification or a district field change to equip the machines with a proximity detection system."¹⁴ Murray Energy believes that the A&CC is a fine organization; but its resources are very limited and stretched very thin. We know from our own experience, as well as discussions with our colleagues in the industry, that A&CC engineers are often pulled from their normal duties to assist other MSHA components on tasks such as accident investigations, and even their normal duties are very time-intensive. In short, we seriously doubt that the A&CC will have the resources to complete the tasks associated with retrofitting of 1,150 continuous mining machines in accord with the compliance deadline in the Proposal.

As for district field changes, electrical engineers in the MSHA coal mine district offices are also stretched terribly thin, and their capabilities and qualifications are not consistent. The Agency also describes what it terms an "optional Proximity Detection System (PDA) program which allows a proximity detection manufacturer to obtain MSHA *acceptance* for a proximity detection system (PDA Acceptance Number). This acceptance states that the proximity detection system has been *evaluated* under 30 CFR Part 18 and is *suitable for incorporation* on an MSHA-approved machine." (Emphasis added.)¹⁵ All well and good theoretically, perhaps, except that nothing in Part 18 authorizes either district field changes or PDA program acceptance of proximity detection systems. These mechanisms, while they may be expedient from MSHA's point of view, suffer from being *ad hoc* procedures, with no basis in law.

Finally, in connection with the issues of safety and effectiveness, Murray Energy wishes to comment on § 75.1732 (e) of the Proposal "*New Technology*." That provision states: "Mine operators may apply for acceptance of a proximity detection system that incorporates new technology. *MSHA may accept a proximity detection system if it is as safe as those which meet the requirements of this section.*" (Emphasis added.)¹⁶ The preamble to the Proposed Rule contains a lengthy explanation as to why MSHA has proposed this new technology subsection,

¹³ *Id.* 54,167.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* 54,179.

including a process for how a mine operator or *manufacturer* could obtain such an acceptance.¹⁷ We note that the proposed rule itself only applies on its face to mine operators and not manufacturers. Consequently, MSHA must clarify the scope of this provision, should it be promulgated. Furthermore, the concept that a proximity detection system may be accepted “if it is as safe as those which meet the requirements of this [proposed] section” 75.1732 must have some substance and left behind it. Until MSHA develops, through notice-and-comment rulemaking, testing requirements that will provide assurances that proximity detection systems are safe and effective for their intended use, the concept in the preamble has little, if any, meaning. The preamble explanation also sets out an application, evaluation, and acceptance procedure. Here too, this conceptual framework must be fleshed out and must be subjected to notice-and-comment rulemaking. In short, Murray Energy finds this conceptual framework to hold potential for answers to our concerns about needing assurances regarding the safety and effectiveness of proximity detection systems. We would encourage MSHA to explore these concepts more carefully, and consider developing a measurable set of specifications, pursuant to Mine Act § 318 (i), applicable to both new and existing technology. *We caution, in the strongest sense possible, that should MSHA wish to adopt a regulatory system such as is described in the preamble then notice-and-comment rulemaking is essential—bare preamble language itself simply does not pass due process muster.*

Thus, the preamble speaks to a requirement that the mine operator or manufacturer would “have to provide the rationale for requesting acceptance of a system” to the A&CC.¹⁸ The A&CC would “evaluate” the system, which evaluation “might include an assessment of the technology used; the reliability of the system; the ability to stop movement of the machine before pinning, crushing, or striking a miner, the capability of providing early warning notification before stopping movement; the ability of the system to work while protecting multiple miners; and an assessment of the system’s compatibility with other electrical systems in the mine.”¹⁹ All of these issues are among the criteria that Murray Energy believes are essential to address for purposes of determining the safety and effectiveness of not just new technology, but existing technology as well. Indeed, these criteria fall squarely within the kinds of factors that MSHA should examine if it were to exercise its authority under the “accident protection” provisions of Mine Act § 318 (i) itself. However, simply listing these factors in the preamble to this Proposal is not sufficient. Once again MSHA must add flesh to the bones of this conceptual sketch—and the only way to do this is through the rigor and discipline of notice-and-comment rulemaking. *To reemphasize, any mandate for proximity detection systems must include regulations by which coal mine operators and coal miners can be assured that these systems are safe and effective for their intended use.*

MSHA Has Not Demonstrated that the Problem it has Identified Exists

¹⁷ *Id.* 54,173.

¹⁸ *Id.*

¹⁹ *Id.*

As noted at the outset of these comments, Murray Energy has significant doubts about the accuracy of MSHA's analysis of the problem this Proposed Rule is intended to correct. According to the preamble, the purpose of the Proposed Rule is to "strengthen protections for miners by reducing the potential for pinning, crushing or striking fatalities and injuries to miners who work near continuous mining machines."²⁰ As the basis for this justification, the Agency states that it "has *conducted a review* of fatal and nonfatal pinning, crushing, and striking accidents in underground coal mines involving continuous mining machines to identify those that could have been prevented by using a proximity detection system." (Emphasis added.)²¹ The preamble then states that from 1984 through 2010, MSHA estimated that 30 could have been prevented through the installation of proximity detection systems and that 220 nonfatal injuries could have been prevented.²² Further, "*MSHA's analysis of fatalities and non-fatal accidents during the 1984 through 2010 period* indicates that many of these accidents occurred in confined areas in underground coal mines where a proximity detection system could have warned the miners and stopped the machine before the accident." (Emphasis added.)

Murray Energy finds these bare assertions to be conclusory and unpersuasive. We urge MSHA to publish its review and analysis so that we and other interested persons can examine these documents to form our own determinations about what they demonstrate. Once having published these documents, MSHA should then reopen the comment period for an additional 30 days to allow comment on the documents to become part of the administrative record of this Proposal.

Conclusion

Murray Energy appreciates the opportunity to comment on the Proposal. As is demonstrated above, the Proposal is fatally flawed in that:

- MSHA's proposed compliance deadlines are confusing, unrealistic, impractical, and infeasible;
- the Agency has not demonstrated that currently available proximity detection systems are safe and effective in complying with the Proposal; and
- MSHA has not demonstrated that the Proposed Rule will correct the problem it has identified.

²⁰ *Id.* 54,164.

²¹ *Id.*

²² *Id.*

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Consequently, Murray Energy insists that the Proposal be withdrawn.

Sincerely,

A handwritten signature in black ink, appearing to read "Pat Brady", written in a cursive style.

Pat Brady
Manager of Safety and Regulatory Affairs