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Sent: Monday, August 01, 2011 4:04 PM

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

Subject: RIN 1219-AB73: Supplemental Comments of BHP Billiton New Mexico Coal, Murray Energy Corporation, and Peabody Energy on MSHA's Proposed Rule on Patterns of Violations

Importance: High

Pursuant to MSHA's notice published in the Federal Register for June 20 (76 Fed. Reg. 35,801), attached please find the supplemental comments of BHP Billiton New Mexico Coal, Murray Energy Corporation, and Peabody Energy on RIN 1219-AB73: MSHA's Proposed Rule on Patterns of Violations. We thank you for the opportunity to provide additional comments on the proposal.

Sincerely,

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AB73-COMM-87



August 1, 2011

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

**Re: Supplemental Comments of BHP Billiton New Mexico Coal,
Murray Energy Corporation, and Peabody Energy on MSHA's
Proposed Rule on Patterns of Violations: RIN 1219-AB73**

Dear Ms. Fontaine:

Introduction

Pursuant to the notice published in the Federal Register for June 20, 2011 (76 Fed. Reg. 35,801), announcing an additional public hearing and an extension of the post-hearing comment period until August 1, 2011, please find below the comments of BHP Billiton New Mexico Coal, Murray Energy Corporation, and Peabody Energy (hereinafter "the Companies") supplementing the Companies' initial comments of April 18, 2011 (AB73-COMM-74) on MSHA's Proposed Rule on Patterns of Violation (30 C.F.R. Part 104) (the "NPR"), published in the Federal Register for February 2, 2011 (76 Fed. Reg. 5,719). In section III of the June 20 notice, MSHA published a "clarification" of the Pattern of Violations ("POV") proposal. It is on this clarification that our supplemental comments will focus. More specifically, our supplemental comments will address--

- the Agency's current idea about how it should go about obtaining public comment on the development of, and periodic revision to, the POV screening criteria; and
- MSHA's clarification of what would constitute a safety and health management program for consideration by the Agency as a mitigating circumstance in the POV proposal.

The POV Screening Criteria

In the June 20 notice, MSHA solicited comments on how it should obtain comment from the public during the development of, and periodic revision to, the POV screening criteria, saying that it currently “plans to provide any change to the specific criteria to the public, via posting on the Agency’s Web site, for comment before MSHA uses it to review a mine for a POV.”¹ The notice continued as follows: “MSHA plans to review and respond to comments, and revise, as appropriate, the specific criteria, and post its response to the comments and the revised specific criteria on the Agency’s website.”²

As we discussed in our initial April 18 comments on this NPR, the Companies are strongly opposed to this sort of plan. We remain firmly of the view that the specific criteria that MSHA will use to decide whether to issue a POV notice must be published in the Federal Register for comment, in accordance with the rulemaking requirements of the Federal Mine Safety and Health Act of 1977, as amended (the “Mine Act”), and the Administrative Procedure Act (“APA”). The Companies discussed our position at length in our aforementioned initial comments, and we will not repeat that discussion in these supplemental comments.³ Simply put, however, the instantaneous communications of the internet age are emphatically not a substitute for the fundamental due process protections afforded the public by proper Mine Act and APA notice-and-comment rulemaking.

Mitigating Safety and Health Management Programs

The June 20 notice also attempts to clarify what MSHA believes would constitute a safety and health management program for consideration by the Agency as a mitigating circumstance for purposes of the POV NPR. Thus, the notice specifies that “MSHA would like to clarify that the Agency did not intend that these safety and health management programs be the same as those referenced in the Agency’s rulemaking on comprehensive safety and health management programs (RIN 1219-AB71), which has not yet been published as a proposed rule.”⁴ Going on, the notice said that “a safety and health management program that would be considered by MSHA as a mitigating circumstance in the POV proposal would be one that: (1) Includes measureable benchmarks for abating specific violations that could lead to a POV at a specific mine; and (2) addresses hazardous conditions at the mine.”⁵

¹ 76 Fed. Reg. 35,802.

² *Id.*

³ See AB73-COMM-74 at 3-5.

⁴ 76 Fed. Reg. 35,802.

⁵ *Id.*

The Companies are interested to learn about this clarification because, in our initial comments, we were concerned about the vagueness of the NPR and its relationship, if any, to RIN 1219-AB71.⁶ Thus, it is helpful for the Companies to understand that what MSHA is thinking about in the context of the POV NPR is different than the comprehensive program referenced in its yet-to-be-published rule. However, other than noting that difference, the remaining portion of the clarification statement merely repeats what the preamble to the February 2, 2011 proposed rule has already stated, *i.e.*, the safety and health management program used as a mitigating factor in POV review will consist of “measureable benchmarks for abating specific violations that could lead to a POV and addressing these hazardous conditions at [the] mine[.]”⁷ Consequently, the Agency’s thinking remains fraught with the seeds of confusion and unnecessary duplication since without further explanation of the requirements for the mitigating health and safety management program, as we said in our April 18, 2011 comments, the proposed rule “suffers the fundamental flaw of being too vague both for giving operators a reasonable opportunity to comment on it and for its downstream enforcement as a mandatory standard”⁸.

The Companies must ask MSHA to explain what is the justification for two kinds of safety and health management programs? Is the program described in the February 2 proposal and the June 20 notice truly a safety and health management program? We think our questions are not just rhetorical. They merit serious thinking by MSHA. This is especially true in light of the difficulty MSHA currently has in timely and effectively dealing with issues such as ventilation plans. How will the Agency be able to deal with two kinds of safety and health management programs, an area where, to begin with, we seriously question MSHA’s fundamental expertise and judgment abilities? In this regard, the Companies note that in its recently published semi-annual regulatory agenda, MSHA has said that in September, it intends to hold “additional public meetings to gather more extensive information” on its plan to develop proposed regulations for comprehensive safety and health management programs.⁹

To avoid confusion and unnecessary duplication and to comport with the President’s instructions in his January 2011 Executive Order 13,563, that industry should be regulated in the least burdensome fashion, with the costs of cumulative regulations taken into account, we reiterate our initial comments about allowing companies with existing safety and health management programs to obtain credit for them in the POV context.¹⁰

⁶ AB73-COMM-74 at 15 and 16.

⁷ 76 Fed. Reg. 5,721.

⁸ AB73-COMM-74 at 15.

⁹ <http://www.msha.gov/REGS/UNIFIED/July2011/1219-AB71.asp>

¹⁰ AB73-COMM-74 at 16.

Ms. Roslyn B. Fontaine
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The Companies appreciate the opportunity to provide these supplemental comments to MSHA and hope you find them to be of use.

Sincerely,

A handwritten signature in black ink that reads "Edward M. Green". The signature is fluid and cursive, with a long, sweeping flourish at the end.

Edward M. Green
Counsel for the Companies

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