

ENCLOSURE F

AB79-COMM-10-6



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NIOSH Docket Office
1090 Tusculum Avenue
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Cincinnati, OH 45226-1993

Re: RIN 0920-AA60

Dear Ladies and Gentlemen:

**Comments on Interim Final Rule Re Extension of Transition Period for
Introduction of Closed-Circuit Escape Respirators**

Please find below and attached the comments of Murray Energy Corporation (and its trade association, the Bituminous Coal Operators' Association), BHP Billiton San Juan Coal Company, and Interwest Mining Company (hereinafter "the Companies") on the Interim Final Rule Re Extension of the Transition Period for Introduction of Closed-Circuit Escape Respirators ("CCFRs") (hereinafter "the Interim Final CCFR Rule" or "Rule"), issued by the Secretary of Health and Human Services on January 14, 2015, and published in the Federal Register on January 29, 2015. 80 Fed. Reg. 4,801. The Rule revises section 84.301 of 42 C.F.R. Part 84 ("Approval of Respiratory Protective Devices") to, among other things, authorize CCFRs used in "Cap 1" and "Cap 3" mining applications¹ to be manufactured, labeled, and sold as approved by NIOSH "until either April 9, 2015 or 6 months after the date of the first NIOSH approval of a respirator model" used in mining applications.² The stated purpose of the Interim Final CCFR Rule is to "allow sufficient time for respirator manufacturers to meet the demands of the mining, maritime, railroad, and other industries."³ At the outset, the Companies wish NIOSH to know that the Interim Final CCFR Rule is a major step in the right direction. However, the Companies also must insist that the Rule does not go far enough, as our comments below explain.

¹ See 42 C.F.R. § 84.304 for Table 2, Capacity (or "Cap") Test Ratings.

² *Id.* 4,804. The Companies note the role of the Mine Safety and Health Administration ("MSHA") in the joint review and certification of such respirators with the National Institute for Occupational Safety and Health ("NIOSH"), pursuant to 42 C.F.R. § 84.3.

³ *Id.* 4,802.

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To begin, the Companies are pleased that NIOSH, in the preamble to the Interim Final CCFR Rule, has posed two key issues of interest to us for comment, as follows:

- Will the six-month compliance date “provide sufficient time for respirator manufacturers to develop production capacity to meet expected market demand. . .?”⁴
- Comments are also “invited on any topic related to this rulemaking.”⁵

We are happy to respond to each of these issues.

SUFFICIENCY OF THE SIX-MONTH COMPLIANCE DATE

As operators of underground coal mines, the Companies are major users of CCFRs (or, as they are called in the coal mining industry, self-contained self-rescuers (“SCSRs”)). The Companies are required by various provisions of the Federal Mine Safety and Health Act of 1977, as amended (the “Mine Act”)⁶, and the Mine Act’s implementing regulations found in 30 C.F.R. Part 75 to furnish our miners with ample supplies of CCFRs.⁷ In particular, section 75.1714 mandates that each operator shall make available to each miner and authorized visitor who goes underground a Part 84-approved CCFR. Following the 2006 Sago Mine explosion and the enactment of the MINER Act amendments⁸, to the organic Mine Act, section 75.1714-4 was promulgated requiring thousands of additional CCFRs in work places, on mantrips, and in escapeways. As NIOSH will recall, implementation of that MINER Act requirement caught respirator manufacturers short in that the regulatory deadline for that mandatory safety standard was wholly inadequate for production capacity to meet legally required demand. That legally required demand was not waived or relaxed by MSHA; and the Companies (and many other underground coal mine operators), through no fault of their own, were subjected to MSHA’s nondiscretionary enforcement of section 75.1714-4.

The Companies are grateful that NIOSH has recognized this problem could re-occur; and we are pleased that the agency has worked to address it in the context of this Interim Final CCFR Rule. Nevertheless, we must tell you that the past experience of the Companies with section 75.1714-4 teaches that the previous problem will be repeated unless NIOSH extends the Rule considerably further than six months. The Companies want to assure NIOSH that, given adequate time to purchase new CCFRs, we are committed to doing so. However, as the customers of CCFR manufacturers, we must have an orderly transition and enough time not only to (1) purchase new CCFRs, but also to be (2) supplied with the new devices; as well as to be able to (3) train our miners in their safe and effective use.

⁴ *Id.*

⁵ *Id.*

⁶ 30 U.S.C. §§ 801, *et. seq.*

⁷ 30 C.F.R. §§ 75.1714-75.1714-8.

⁸ Pub. L. No. 109-236.

We also note, with approval, the comments of the National Mining Association (“NMA”) on the Interim Final CCER Rule, especially NMA’s observation that if only one manufacturer obtains Part 84 approval of a new CCER, then the Rule would truly compromise the ability of the Companies and other operators to obtain sufficient numbers of replacement CCERs in the time allowed by the Rule.

The Companies appreciate and understand that NIOSH’s stakeholders, in connection with its responsibilities to approve CCTRs, include not only coal mine operators and coal miners, but also the maritime, railroad, and other industries where CCERs are required (and the workers in these industries), as well as respirator manufacturers. Indeed, we understand that a greater number of CCTRS are used in the maritime, railroad, and other industries than are used in U.S. underground coal mines. The Companies submit, however, that we and other underground coal mine operators have significantly different circumstances at play than do the aforementioned industries. These circumstances dictate that revisions to the Interim Final CCER Rule should distinguish the underground coal mining industry from the other aforementioned industries. NIOSH has authority to make such distinctions. We address those circumstances next as we discuss other topics related to this rulemaking.

OTHER TOPICS RELATED TO THIS RULEMAKING

We note the reference in the Rule’s preamble to the June 19, 2014 stakeholders’ meeting held by MSHA.⁹ The Companies participated in this meeting. We told the NIOSH representatives present, in no uncertain terms, that NIOSH needed to extend the then-mandated April 9, 2015 deadline as soon as possible in order to allow new CCTRs to be: (1) approved; (2) produced in sufficient numbers; and (3) introduced underground for an orderly transition, instead of what was then a looming train wreck. As we stated at the outset of these comments, the Interim Final CCER Rule is a major step in the right direction. However, the Rule has a fatal flaw which must be addressed. Specifically, it utterly fails to take into account the circumstances involved in the entire panoply of events that can occur with regard to miners escaping from underground coal mines in the event of an explosion, fire, or other emergencies. In its revisions to the Interim Final CCER Rule, NIOSH must not only consider all the cutting edge research regarding CCERs and self-contained breathing apparatus (“SCBAs”) being carried out by NIOSH’s Office of Mine Safety and Health Research (“OMSHR”), but also the OMSHR research regarding refuge alternatives. In this regard, the work of NIOSH’s Breathing Air Supplies (“BAS”) Partnership and the Refuge Alternative Partnership are intimately related to the best outcome for revisions to the Interim Final CCER Rule.¹⁰

⁹ 80 Fed. Reg. 4,803.

¹⁰ As a general comment, the Companies want to tell NIOSH that we strongly and wholeheartedly support these NIOSH partnerships. They engage all mining stakeholders, *i.e.*, operators, manufacturers, representatives of miners, NIOSH experts, and MSHA observers on the most neutral playing field available to us – and one where candid discourse points the way toward solid scientific work and safe and healthful outcomes for all partners.

The most recent meeting of the BAS Partnership took place at NIOSH's Bruceton, PA campus on October 29, 2014. The Companies participated actively in this important meeting as partners. We have enclosed the materials from this meeting to this letter, as part of our comments.

In addition, please find enclosed the *Meeting Summary & Recommendations* of the October 29 BAS Partnership meeting, prepared by Susan M. Moore, Ph.D., NIOSH's Director, OMSIIR Division of Mining Science & Technology. Especially relevant to the Companies' comments is the following key excerpted recommendation from the meeting summary:

Recommendations to NIOSH

- *The mining industry desires to provide mine workers with improved SCSR technology as outlined in NIOSH's 2012 rule, 42 C.F.R. 84 --O. However, at this time, no SCSR manufacturers have submitted for certification a CAP 3 device -- the only type of device capable of meeting MSHA's "one hour" duration requirement for underground coal mines by MSHA -- despite the rule's requirement that no manufacturer may sell a device not certified to NIOSH's 2012 rule after April 2015. Partnership representatives from both labor and industry recommend[ed] that NIOSH consider the negative impact this lack of availability of certified technology will have on the industry and its workers and urged NIOSH to put into action a plan that would address this issue while taking into consideration two critical issues. These issues are: 1) the recent R&D advancements within NIOSH's research program that would result in SCSRs that not only comply with NIOSH's 2012 rule but also provide additional functionalities such as seamless changeover between SCSR units and verbal communications via a hood with an inner mask, and 2) the mining industry's current economic reality, which precludes it from changing out its SCSR inventory more than once--i.e., the industry cannot sustain changing out these technologies once for compliance to the NIOSH 2012 rule and then a second time, only a few years later, to embrace the recent R&D advancements from within NIOSH's research program. (Emphasis added.)*

Our emphasized portion of Dr. Moore's excerpt is absolutely crucial to NIOSH's decision-making with regard to revising the Interim Final CCR Rule. At this juncture, to reiterate, the economic reality challenging the Companies and the underground industry must be understood and factored into this rulemaking by NIOSH.

The same concerns were discussed at the February 10 meeting on the Bruceton campus of the NIOSH Refuge Alternative Partnership. The materials from this meeting are also enclosed to our letter.

Here too, a train wreck is looming since MSHA's refuge alternative mandatory safety standards currently insist that grandfathered prefabricated RA *structures* are only permitted until December 31, 2018, unless approved by MSHA under 30 C.F.R. Part 7. Our understanding is that only one of these grandfathered structures are currently Part 7-approved. We think the time remaining before December 31, 2018 is wholly insufficient for these structures to gain approval and be produced and installed underground. Especially since NIOSH's refuge alternative research and the work of the NIOSH Refuge Alternative Partnership are all trending toward a generation of refuge alternatives significantly different than the currently deployed fleet, it would be a waste of the limited resources of the MSHA Approval & Certification Center (A&CC) to spend time on approving the structures of these grandfathered RAs. Instead, the A&CC should focus its energies on approving new refuge alternative technologies as they are ready to come on line. This problem, too, should be factored into NIOSH's thinking on revising the Interim Final CCR Rule. In the Companies' comments on MSHA's Request for Information ("RFI") on RAs, which we will send to MSHA on April 2, we will ask MSHA for an extension of that December 31, 2018 deadline in order for the development of the next generation of technologically advanced RAs.¹¹ We ask that NIOSH urge MSHA to join in our request as the agency works with MSHA. Please note we are sending copies of these comments to MSHA's coal mine safety and health leadership.

Finally, the Companies note that the seven recommendations on improving self-escape from underground coal mines made by the National Research Council's Committee on Mine Safety: Essential Components of Mine Escape, have not received as much attention from NIOSH (and MSHA) as they should.¹² Those recommendations should be considered by NIOSH as an overlay to the agency's consideration of revisions to the Interim Final CCR Rule.¹³

To conclude, the Interim Final CCR Rule is an important recognition by NIOSH that the April 9, 2015 deadline (standing alone as it did in the rule supplanted by the Rule) is unworkable. The Rule is a major step in the right direction. However, as we sketch out above, the solution to the need to protect miners who are escaping from underground mine explosions, fires, or other emergencies must be holistic, as must the solution to sheltering those miners who

¹¹ The Companies will send a copy of these April 2 comments on MSHA's RA RFI to the NIOSH docket; and we respectfully request that NIOSH will include them as it considers revisions to the Interim Final CCR Rule.

¹² *Improving Self-Escape from Underground Coal Mines*, the National Academies Press, 2013.

¹³ The Companies note, with approval, the publication in the Federal Register for March 27, 2015, of a notice seeking comment on an information collection request from the Centers for Disease Control to the Office of Management and Budget on a proposed project re *Emergency Escape for Coal Miners*. The Companies are studying this notice, with a view toward providing feedback on it.

cannot escape to the surface. The Companies are committed to working on NIOSH's BAS and Refuge Alternative Partnerships. We believe the work of those Partnerships will provide the framework for these holistic outcomes; and necessary revisions to the Interim Final CCFR Rule must be developed parallel to and consistent with the work of these Partnerships.

Please let us know if you have any questions or desire further input.

Sincerely,



Edward M. Green
Counsel for the Companies

Enclosures

cc: The Honorable John Howard (w/o enclosures)
Frank J. Hearl, P.E. (w/o enclosures)
Lew Wade, Ph.D. (w/o enclosures)
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