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VIA EMAIL AND COURIER

Ms. Sheila A. McConnell  
Acting Director  
Office of Standards, Regulations, and Variances  
U.S. Department of Labor  
Mine Safety and Health Administration  
201 12<sup>th</sup> Street South  
Arlington, VA 22202

Re: RIN 1219-AB79--Comments on Reopening of Record on the Request for  
Information on Refuge Alternatives in Underground Coal Mines and Public  
Meeting of October 19, 2015

Dear Ms. McConnell:

Please find below and enclosed the comments of Murray Energy Corporation (and its trade association, the Bituminous Coal Operators' Association ("BCOA")) and Interwest Mining Company (the business unit of PacifiCorp responsible for providing management and support services to PacifiCorp's Bridger Coal Mining Company) (hereinafter "the Companies") on MSHA's Reopening of the Record on the Request for Information on Refuge Alternatives in Underground Coal Mines and the Public Meeting held on October 19, 2015 at MSHA's National Mine Safety and Health Academy in Beaver, WV. This reopening of the record on the request for information ("RFI") was noticed in the Federal Register for September 18, 2015. 80 Fed. Reg. 56,416.

The Companies operate large underground longwall mines located throughout the United States in West Virginia, Kentucky, Ohio, Illinois, Wyoming, and Utah. These mines employ thousands of highly paid miners; and in the rural areas in which they are located, even though the state of the coal mining industry across the Nation is dramatically changing for the worse, nevertheless, currently these mines are fortunate to remain able to function as centers of economic well-being and stability for their communities. The Companies remain dedicated to these communities in which we work and live.

AB79-COMM-17

## **I. INTRODUCTION-**

To begin, the Companies wish to thank MSHA for reopening the record of its refuge alternative RFI on September 18, 2015. This action is consistent with the extensive comments we provided to MSHA on April 2, 2015 at the end of the initial comment period on the RFI.<sup>1</sup> We will not reiterate those comments here. Suffice it to say that our comments provided MSHA then and continue to provide MSHA now with a roadmap to deal with the nettlesome problems posed by the RFI. Central to the comments were our urgent requests to--

- keep the RFI docket open for an extended period of time pending the ongoing work of the NIOSH Refuge Alternative Partnership; and
- extend the December 31, 2018 deadline for MSHA approval of refuge alternative structures.<sup>2</sup>

We shall address our rationale for these requests further below, and we shall briefly describe the reasons for and activities of the NIOSH Refuge Alternative Partnership. Importantly, however; we want you to know that the reasons for these requests are even more powerful now than they were this past April. In that regard, the Companies also appreciate that MSHA extended the comment period until today.<sup>3</sup> We were pleased to see that the stated reason for extending the comment period was to give “stakeholders additional time to provide input on the current state of refuges in use and recent research and new technology that may lead to the development of a new generation of refuges.”<sup>4</sup> The Companies support that stated objective. It is disappointing, therefore, that MSHA once again seems to be closing this docket as of today's date for no good reason that we can identify. If the agency is serious about the aforementioned purpose of the November 18 extension of time, then all the more reason to keep the docket of this RFI open. The Companies, therefore, urge once again that MSHA not close this docket. We also urge that MSHA accept our thematic comments below.

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<sup>1</sup> See RIN 1219-AB79-COMM-10 through AB79-COMM-10-7. April 2, 2015.

<sup>2</sup> 30 C.F.R. §75.1506(a)(3) grandfathers prefabricated refuge alternative structures approved by states and accepted by MSHA in emergency response plans and in service prior to March 2, 2008 until December 31, 2018.

<sup>3</sup> The extension was published in the Federal Register for November 18, 2015. 80 Fed. Reg. 72,028.

<sup>4</sup> *Id.*

## **II. KEEP THE RFI DOCKET OPEN FOR AN EXTENDED PERIOD OF TIME PENDING THE WORK OF THE NIOSH REFUGE ALTERNATIVE PARTNERSHIP**

As the Companies urged MSHA to do in our April 2, 2015 comments, because of the importance of the work of the NIOSH Refuge Alternative Partnership (the "Partnership"), it makes no sense to close the docket as of today's end of the comment period. We say that because the work of the Partnership not only has continued since April 2, 2015, but it will remain ongoing for a considerable period of time into the future. As the research projects fostered by the Partnership reach major milestones along the way to completion, and then (in a number of cases) to commercial application, the most efficient way for these technological advances to be eventually accommodated in MSHA's refuge alternative rules in 30 C.F.R. Parts 7 and 75 is to allow MSHA's docket to remain open. Otherwise, MSHA will have to continue to re-open the record in a herky-jerky fashion, with a concomitant use of the agency's limited resources. Such actions serve no useful purpose whatsoever.

*The Companies, therefore, renew the request we made in our April 2, 2015 comments for MSHA to promptly and specifically publish a notice in the Federal Register announcing that the docket for the Refuge Alternative RFI will be kept open for an extended period of time pending the work of the NIOSH Refuge Alternative Partnership. Consistent with our April 2, 2015 comments, as well as these current comments, the Companies also urge MSHA to propose an extension of the December 31, 2018 deadline in 30 C.F.R. §75.1506(a)(3) for MSHA approval of refuge alternative structures.*

## **III. THE NIOSH REFUGE ALTERNATIVE PARTNERSHIP**

We also want to remind MSHA of the reasons why the NIOSH Refuge Alternative Partnership was created. Simply stated, the post-Sago Mine explosion reactions of the United States Congress' provisions in the MINER Act dealing with refuge alternatives pushed both NIOSH to recommend--and then MSHA to mandate through regulations the deployment by underground coal mine operators throughout the country of a fleet of portable inby refuge alternatives.<sup>5</sup> Implementation of these regulations did not, to put it mildly, come easy. Millions of dollars were spent nationwide by the Companies and other underground coal mine operators to purchase, install, and maintain this fleet, and to train miners in their use. During that time, a variety of refuge alternative manufacturers (some of which were established companies, and others of which were less experienced companies seeking a market niche) developed, marketed, and sold portable inby refuge alternatives.

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<sup>5</sup> Mine Improvement and New Emergency Response Act of 2006 (MINER ACT) Section 13. Pub. L. No. 109-236.



Not only were these development activities costly and time-consuming for the Companies and other mine operators, but also all of these manufacturers had to work with the MSHA Approval & Certification Center (“A&CC”) to obtain Part 7 approval of refuge alternative components dealing with breathable air, air monitoring, and harmful gas removal. It is not our intent to be critical of the dedicated engineers of the A&CC; but they are perennially understaffed—and are frequently detailed to assist MSHA’s inspectorate in a variety of other tasks. The results of this effort, therefore, (culminating in the regulatory deadline of December 31, 2013) were not only time-consuming, but regulatory chaos ensued. In addition, and compounding this chaos, heat, humidity, and purging hazards in portable inby refuge alternatives deployed underground were identified by NIOSH; and MSHA failed to timely address these life-threatening problems.

What seemed to us especially strange during this period of time was that MSHA not only seemed to turn a blind eye to these issues, but the agency's leadership at the highest level seemed to become increasingly hostile to both industry and NIOSH---akin to shooting the messenger bringing bad news. NIOSH, the United Mineworkers of America (the UMWA), and mine operators (including the Companies) began working together in a partnership to address these problems, but it was not until March 2014 when MSHA half-heartedly joined the effort.

Even then the acquiescence of MSHA seemed lukewarm such that the first NIOSH Refuge Alternative Partnership Workshop did not take place until May 2014 with several MSHA observers present but silent virtually throughout the meeting. By then NIOSH had published two vitally important reports of investigation on the heat, humidity, and purging hazards earlier identified.<sup>6</sup> It appeared to us, therefore, that in 2014, MSHA slowly began to recover from its earlier suspicions about both the merits of the refuge alternative hazards identified, as well as the motives of mine operators and MSHA's sister agency, NIOSH.

In 2015, it appeared to us that a more cooperative attitude by MSHA developed. Thus, on February 10, 2015, a vitally important meeting of the NIOSH Refuge Alternative Partnership took place at the campus of NIOSH’s Office of Mine Safety and Health Research (“OMSHR”) in Pittsburgh, with all stakeholders represented, including MSHA. At that meeting, the sum and substance of all the refuge alternative scientific research being carried out by NIOSH was presented and discussed. Finally, on April 1, 2015, NIOSH published a third report of

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<sup>6</sup> On March 27, 2014, NIOSH published two reports of investigations (“RIs”): (1) RI 9694, Investigation of Purging and Airlock Contamination of Mobile Refuge Alternatives; and (2) RI 9695, Investigation of Temperature Rise in Mobile Alternatives. These two RIs are hereby incorporated by reference in the Companies’ comments, as though fully set forth.

investigation on refuge alternatives---this one dealing with issues regarding built-in-place refuge alternatives.<sup>7</sup>

As we stand now, it appears to the Companies that we are at an important junction in the road. That junction has been well described recently by Dr. Jeffrey Kohler, currently Professor and Chair of Mining Engineering at Penn State University, and formerly, for years, the Associate Director of NIOSH for OMSHR. Testifying on October 21, 2015 at an MSHA oversight hearing before the Workforce Protections Subcommittee of the House Education & the Workforce Committee, Dr. Kohler said:

Occasionally, despite the best efforts of manufacturers, government, and industry, a technology falls short. Such is the case with mobile refuge chambers. Miners and mine operators have no confidence that these units can be deployed and utilized to save lives during an emergency. Rather than continue the facade, we should move forward with a known and workable alternative - the in-place shelter. While not perfect, nor universally applicable, it represents a superior alternative for a majority of miners.<sup>8</sup>

The Companies do not agree with Dr. Kohler's view that the in-place shelters are a panacea for all the problems of the regulatory requirements for underground refuge alternatives. Rather the Companies believe in the efficacy of both portable refuge alternatives and in-place shelters—depending on the underground circumstances in which they are deployed. Both properly constructed and approved portable units and built-in-place units have their place—and it is the mine operator who is best equipped to determine when and whether, in the mining conditions at hand, portable units or built-in-place units should be deployed.

Having said this, the Companies agree entirely with Dr. Kohler's statement that the technology of refuge alternatives to date has fallen short. It has fallen short not only of what Congress was hoping would take place when it enacted the technology-forcing refuge alternative provisions of the MINER Act, but refuge alternative technology has also fallen short of the expectations of underground coal mine operators, the hopes of a variety of entrepreneurial refuge alternative vendors—and, most importantly, the hopes and expectations of miners themselves. The Companies, for example, are in compliance with MSHA's refuge alternative regulations. However, we believe we can hardly count on the fingers of one hand the number of our miners who have confidence in the current generation of deployed inby portable refuge alternatives.

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<sup>7</sup> RI 9698, Facilitating the Use of Built-In-Place Refuge Alternatives in Mines. April 1, 2015. RI 9698 is also hereby incorporated by reference in the Companies' comments, as though fully set forth.

<sup>8</sup> A copy of Dr. Kohler's oral statement to the Subcommittee is attached.



The Companies must ask themselves—as MSHA must also—what is to be done going forward?

#### IV. NEXT STEPS

Not only should the refuge alternative docket be kept open, but also MSHA should extend (as we noted at the outset) the December 31, 2018 deadline for MSHA approval of refuge alternative structures. We initially urged that MSHA take this action in the comments we filed originally on this RFI.<sup>9</sup> That was nine months ago. The deadline is now less than 24 months away. The Companies are gravely concerned that unless that deadline is extended immediately, we will be heading toward a regulatory train wreck, in which the underground coal mining industry will find itself with its current fleet of inby portable refuge alternatives unapproved per 30 C.F.R. § 75.1506(a)(3). That is not only hauntingly similar to the debacle that occurred in 2013 with regard to the mandate for MSHA Part 7-approved breathable air, air-monitoring, and harmful gas removal components of refuge alternatives; but also—and simply put—this is an unacceptable scenario.

Our concerns are buttressed by the fact that the enclosed table from MSHA’s website, entitled “REFUGE ALTERNATIVES AND REFUGE ALTERNATIVE COMPONENTS APPROVED UNDER PART 7,” show neither MSHA Part 7 approval of any complete refuge alternatives, nor any Part 7 approvals of any structural components. The Companies note that this table was last updated on October 16, 2015. Perhaps the A&CC has progressed to the point of issuing Part 7 approvals for refuge alternative structural components—or even complete refuge alternatives. If so, we urge MSHA to share this information with us and other stakeholders.

As we said in our April 2, 2015 comments, however, for MSHA to continue to demand that this December 31, 2018 deadline be adhered to is barking up the wrong tree. Unless MSHA extends the date, as Dr. Kohler said in his October 21 testimony, “despite the best efforts of manufacturers, government, and industry, [refuge alternative] technology [will] fall[] short.” Surely no one wants that to happen. MSHA’s limited resources, and the time and energy of refuge alternative manufacturers should, therefore, in lieu of chasing what is, in effect, the obsolescent objective of section 75.1506(a)(3), be devoted instead to developing what MSHA acknowledges is important, that is “new technology that may lead to development of a new generation of refuges.”<sup>10</sup>

#### A Refuge Alternative Partnership Summit—

To work toward that objective, the Companies recommend that MSHA work with NIOSH to hold a “Refuge Alternative Partnership Summit.” As noted earlier, the Partnership

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<sup>9</sup> *Supra* at footnote 1.

<sup>10</sup> *See* 80 Fed. Reg. 72,028.

last met on February 10, 2015. Almost one year later, the time has come, we believe, for a Summit to be held for three purposes: (1) to examine again the state of refuge alternative technology; (2) to plot out a specific action plan aimed at ensuring the currently deployed fleet of inby refuge chambers are safe for their intended use; and that (3) to develop a time line for (i) phasing out the currently deployed fleet of portable inby refuge alternatives and for (ii) deployment for a new generation of both portable and built-in-place refuge alternatives as they become commercially available.<sup>11</sup>

## **V. THE OCTOBER 19, 2015 PUBLIC MEETING**

A representative of the Companies attended the Stakeholders Meeting on Refuge Alternatives for Underground Coal Mines, held at the National Mine Health and Safety Academy in Beaver, WV on October 19, 2015. The undersigned has also reviewed the transcript of that meeting.

We are pleased that MSHA held the meeting not only because it was a useful exchange of information, but because we believe it supports our call for a Refuge Alternative Partnership Summit. In that regard, and most importantly, although the Companies understand that representatives of NIOSH's OMSHR were present; they were silent throughout the meeting. We and other stakeholders need to know about the status and the road ahead for OMSHR's refuge alternative research program. Furthermore, participants were, when all is said and done, concerned with the same issues the Companies have raised in these comments. The Companies note, especially, the statements of West Virginia's Randall Harris, a pioneer in the field of refuge alternatives, who said the next steps in refuge alternative technology should be:

. . . to find a solution that is flexible enough to allow people to do what they need to do with whatever the latest technology is, and an [MSHA] approval process that is flexible enough to allow the technologies to [be brought to] bear in the appropriate location.

\* \* \*

The whole issue is how do you encourage . . . technological innovation . . . when you have rigid approval processes that are difficult to modify.<sup>12</sup>

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<sup>11</sup> The Companies wish to emphasize that, in keeping with the principle that trapped miners should strive to escape to the surface whenever possible, the work of the Refuge Alternative Partnership should go hand-in-hand with that of the Breathable Air Supplies Partnership.

<sup>12</sup> Transcript of October 19 Meeting at 75.

**VI. CONCLUSION**

In conclusion, the Companies urge MSHA to—

- keep this RFI docket open for an extended period of time pending the ongoing work of the NIOSH Refuge Alternative Partnership;
- extend the December 31, 2018 deadline for MSHA approval of refuge alternative structures, as is presently mandated by 30 C.F.R. §75.1506(a)(3); and
- work with NIOSH's OMSHR to convene a NIOSH Refuge Alternative Summit Meeting to begin finding the solution described above by Mr. Harris and to ensure the best efforts of manufacturers, government, and industry do not fall short.

The Companies thank MSHA for the opportunity to comment on this vitally important issue. We are prepared to work with MSHA (and NIOSH) to achieve what we are confident are mutually shared goals.

Sincerely,



Edward M. Green  
Counsel for the Companies--Murray Energy  
Corporation, BCOA, and  
Interwest Mining Company

Enclosures

Copy with Enclosures:

The Honorable John Howard, M.D. Director, NIOSH