



Edward M. Green  
(202) 624-2922  
egreen@crowell.com

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November 30, 2016

**VIA EMAIL AND COURIER**

Ms. Sheila McConnell  
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-AB86; Docket No. MSHA-2014-0031, Request for Information on Exposure of Underground Miners to Diesel Exhaust Comments of Murray Energy Corporation, the Bituminous Coal Operators' Association, and Interwest Mining Company

Dear Ms. McConnell:

Please find below and attached 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 Request for Information on Exposure to Diesel Exhaust of Underground Miners (the "RFI"). The RFI was published in the Federal Register for June 8, 2016 (81 Fed. Reg. 36,826). Comments were requested by September 1, 2016. As we note below, that deadline was subsequently extended until today—November 30, 2016. Murray Energy operates eleven large underground longwall coal mines and one room-and-pillar operation in West Virginia, Ohio, Illinois, and Utah. Interwest Mining has management oversight and responsibility for Bridger Coal Mine, the underground longwall unit of which provides clean coal to the Jim Bridger Power Plant in Wyoming. The safety and health of the Companies' employees is of paramount importance to the Companies.

1219-AB86-COMM-21, Crowell Moring

## **The RFI—**

On June 27, MSHA announced it would hold four “public meetings” on the RFI on July 12, July 21, July 26, and August 4, 2016 in Salt Lake City, UT, Pittsburgh, PA, Arlington, VA (MSHA Headquarters), and Birmingham, AL, respectively. *See* 81 Fed. Reg. 41,487. Representatives of the Companies presented at the July 26 Arlington, VA public meeting. These comments will address and expand upon those presentations later in this letter.

As the Companies and other stakeholders began analyzing the RFI, it became very clear that, in light of the number and complexity of the questions posed by it, meaningful responses to those questions would not be able to be formulated by September 1. Frankly, the Companies were very concerned about MSHA setting such a short comment period relative to the questions about which MSHA sought answers. Thus, the Companies want you to know we were appreciative that on August 25, the Agency published another notice, this one extending the comment period to November 30. 81 Fed. Reg. 58,424.

In the opinion of the Companies, the RFI I is a formidable document. Its authors have set out a brief history of MSHA’s regulation of the health effects of diesel exhaust with regard to underground miners in the United States, as well as a description of *some* recent research with regard to these health effects. We shall particularly discuss that research further below, especially because MSHA has not identified other recent key scientific literature. Most importantly, however, the Companies wish to state at the outset that the research cited by MSHA simply does not deal with underground coal mines. That is an extraordinarily important fact central to these comments, especially in light of (1) the enormous amount of ventilated air, mandated by federal and state laws in all underground coal mines, which dilutes and sweeps diesel exhaust away from underground coal miners nearby diesel-powered engines and (2) the fact that the carbon content of diesel exhaust cannot be accurately measured in underground coal mines because coal itself is virtually pure carbon.

Central to the RFI are 28 questions aimed at obtaining comments regarding the use of diesel-powered equipment in underground coal mines and underground metal/nonmetal (“MNM”) mines. Our comments are intended to be responsive only to those questions dealing with underground coal mines, *i.e.*, questions 1 through 23. Candidly, however, even though MSHA has extended the comment period until today, the Companies are unable to develop complete answers to the questions. We say that for three reasons. First, the Companies are concerned that a number of these questions seek responses which would contain business-confidential information. Second, and as noted above, the Companies believe that the cited research on the health effects of diesel exhaust on underground miners in the RFI is inapplicable to our underground coal mines. Our comments will discuss this distinction further. Third, the Companies firmly believe that the current MSHA regulations regarding diesel exhaust in underground coal mines are so protective of miners that, categorically, there is no need to change them. The Companies discuss this further below as well.

### **Current Regulation of Exposure of Underground Coal Miners to Diesel Exhaust—**

As mentioned above, the RFI contains a short history of MSHA's regulation of the exposure of underground miners to diesel exhaust. However, this history does not discuss the over decade-long rulemaking, preceded by an earlier pre-rulemaking years-long effort, including the work of the Secretary of Labor's Diesel Advisory Committee in 1988. See "Report of the Mine Safety and Health Administration Advisory Committee on Standards and Regulations for Diesel-Powered Equipment in Underground Coal Mines. All of this activity led to the promulgation of rules beginning in 1996 aimed at protecting the health of underground miners from diesel exhaust; including diesel particulate matter ("DPM") emission limits for diesel-powered equipment finalized as a "midnight rule" on the very last day of the administration of President Bill Clinton. Our recollection is that although the 1996 rules (but not the 2001 DPM emissions limits) were generally agreeable to both industry and labor, the push that carried the DPM emission limits over the finish line at the very last minute was the intense lobbying of the United Mine Workers of America (the "UMWA") and other labor unions. We note this especially because we know that the UMWA has asked MSHA to examine the current MSHA regulations dealing with the health effects of diesel exhaust on underground coal miners and make them more stringent.

In that respect, we have attached the letter of April 4, 2012 from the UMWA's Dennis O'Dell to Assistant Secretary of Labor for Mine Safety and Health, Joe Main (Attachment 1). In addition, we have attached a letter of June 25, 2012 from a group of left-leaning public health academics to the Assistant Secretary, complaining about the supposed laxity of the current MSHA regulations dealing with the health effects of diesel exhaust on underground miners (Attachment 2). The Companies note that two of these academics had senior executive leadership posts in the Clinton Administration's MSHA: (1) Andrea Hricko, now affiliated with the University of California System, was Deputy Assistant Secretary of Labor for MSHA; and (2) Celeste Montforten, now with the George Washington University School of Public Health, was Special Assistant to the Assistant Secretary of Labor for Mine Safety and Health. We mention Mses. Hricko and Montforten specifically, because while they have every right to petition their government, their publicly shared views of the science regarding the regulation of diesel exhaust are demonstrably skewed. Thus, I recall attending a Health Effects Institute Diesel Exhaust Workshop in San Francisco in 1996. Following the presentations of the invited scientific investigators, which were indefinite regarding the health effects of diesel exhaust on underground miners, then-Deputy Assistant Secretary Hricko stood up and declared that although the scientific data on the carcinogenicity of diesel exhaust might still not be definitive, since underground miners had more exposure than any other occupational group, MSHA would regulate their exposure. And so it did.

The Companies have heard that MSHA has received other pleas urging the revision of the current diesel rules. In the interest of transparency, we hope that MSHA will place all such correspondence into this Docket. However, to ensure such documents will be made public, the Companies intend to file a Freedom of Information Act ("FOIA") request with the agency to obtain these and other relevant communications and records.

While the Companies and other coal mining companies were unhappy with the substantive contents of the Clinton Administration's midnight rule setting DPM emission limits, as well as the opaque manner in which MSHA decided to finalize them, nevertheless, the coal mining industry decided to work toward achieving compliance with the rules. In short, a conscious decision was made to live with the current rules (both the 1996 rules when they were promulgated, and the 2001 DPM emission limits) and not challenge them in the federal court system. That decision proved to be the right one. The Companies and other underground coal producers worked with MSHA, equipment manufacturers, and suppliers, as well as NIOSH, on all of these diesel exhaust-related rules over the years so that currently they are well-understood. The Companies are diligently maintaining strict compliance with these rules.

At the July 26 public meeting in Arlington, VA (which we will address more fully below), the undersigned stated for the Companies that "although we're not opposed to new [diesel] rules, we want to make sure they are need- and science-based." Transcript at 75. Upon further consideration of the RFI and the Companies' own experiences with the current diesel rules, the Companies are firmly of the view that new regulations simply are neither necessary nor feasible. The Companies continue to be concerned about the economic and technological feasibility of any new regulations. As I stated at the July 26 Public Meeting, "MSHA has to take into account that the U.S. domestic coal mining industry is under severe stress . . . with prices down and environmental pressures up. *Id.* at 76. Since the July 26 public meeting, the Companies have examined their diesel-powered fleets more closely and are, frankly, convinced that the existing fleets provide superb protection for the Companies' miners, such that new regulations are not necessary. Spread-sheets of the Companies' diesel-powered fleets are attached.

*Fundamentally, therefore, the Companies want to state categorically that they believe the current MSHA diesel-exhaust related rules are more than amply protective of the health of their employees. There is no need to engage in a new rulemaking on this issue for underground coal mines. Having said that, the Companies are providing MSHA with these comments in good faith; and are more than happy to participate as partners in the incipient NIOSH-MSHA Diesel Exhaust Health Effects Partnership.* The Companies are not opposed to ongoing dialogue with MSHA and NIOSH in the medium of a Partnership. Indeed, the Companies strongly endorse the mechanism of Partnerships. The Companies have found other Partnerships (e.g., Refuge Alternatives, Rock Dust, Proximity Detection Systems, Breathable Air) to be extraordinarily useful forums for discussion, including a fruitful mechanism for discussing new rules, with a large audience of experts from the mining industry, the equipment manufacturing sector, NIOSH, and MSHA.

The current coal-related diesel rules to which the Companies refer above are as follows—

- 30 C.F.R. Subpart D of Part 72, Diesel Particulate Matter—Underground Areas of Underground Coal Mines;
- 30 C.F.R. Subpart T of Part 75—Diesel Powered Equipment;



- 30 C.F.R. Subpart E of Part 7—Diesel Engines Intended for Use in Underground Coal Mines;
- 30 C.F.R. Subpart F—Diesel Power Packages Intended for Use in Areas of underground Coal Mines Where Permissible Equipment is Required; and
- 30 C.F.R. Part 36—Approval Requirements for Permissible Mobile Diesel-Powered Transportation Equipment.

**Recent Research on the Health Effects to Underground Coal Miners of Exposure to Diesel Exhaust and the July 26 Public Meeting at MSHA’s Headquarters in Arlington, VA—**

As noted above, it is key to recognize that the recent research on the health effects of diesel exhaust on underground miners does not include research that is relevant to underground coal miners. This is one of the fundamental reasons why the Companies think new diesel exhaust rules for the coal sector are unwarranted. With regard to the NIOSH-NCI Diesel Exhaust in Miners Study (“DEMS”), the Companies have read the comments of the Industrial Minerals Association-North America (“IMA-NA”) and generally endorse them, especially with regard to its comments about DEMS. Most importantly from the Companies’ perspective, however, is that none of the DEMS mines are coal mines. As the undersigned stated at the July 26 Public Meeting, “All of the science that MSHA relies on in this RFI has really no nexus to speak of in the underground coal mining industry, and I want to urge MSHA to consider that as you consider the next steps with regard to coal.” Transcript at 87.

At the July 26 Public Meeting, the Companies’ consultant Dr. Roger O. McClellan spoke at length both for the Companies and the IMA-NA. That Transcript is attached (Attachment 3), as well as the undersigned’s introductory statement and the prepared statement of Dr. McClellan (Attachments 4 and 5). Dr. McClellan’s CV is also attached (Attachment 6). The Companies want to especially emphasize that Dr. McClellan was a member of the Secretary of Labor’s 1988 Diesel Advisory Committee. The Companies urge MSHA to carefully evaluate Dr. McClellan’s comments about the current diesel regulations for underground coal mines, because his experience is long and deep.

During his presentation, Dr. McClellan mentioned he would furnish MSHA a paper he had written recently. That paper, entitled “Providing Context for Ambient Particulate Matter and Estimates of Attributable Mortality,” is attached (Attachment 7). He also mentioned as worthy of the agency’s attention two papers by Khalek and his colleagues. Those two papers are entitled: (1) “Regulated and unregulated emissions from modern 2010 emissions-compliant heavy-duty on-highway diesel engines”; and (2) “Regulated and Unregulated Emissions from Highway Heavy-Duty Diesel Engines Complying with U.S. Environmental Protection Agency 2007 Emissions Standards. They are also attached (Attachments 8 and 9).

The Companies also commissioned Dr. McClellan to prepare some additional analysis to augment his July 26 presentation. That analysis is attached (Attachment 10).

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The Companies very much appreciated the opportunity to present at the July 26 public meeting. Its informal structure, the Companies believe, provided a fruitful knowledge gathering forum for both MSHA and stakeholders. We urge MSHA to utilize this mechanism on a regular basis.

### **The Companies' Fleets of Diesel-Powered Equipment and Their Compliance with MSHA's Current Regulations**

As noted above, the Companies' fleets of diesel-powered equipment are maintained in strict compliance with MSHA's current diesel exhaust rules, including the DPM emissions rules. As noted above, we have attached spreadsheets listing the Companies' respective fleets of diesel-powered equipment (Attachments 11 and 12). These fleets are regularly inspected, maintained, changed out, modified, or refurbished as necessary. The Companies believe that they are in strict compliance with the federal requirements. The Murray Energy Mines in West Virginia are also generally in compliance with the rules of that state.

### **The NIOSH-MSHA Diesel Exhaust Health Effects Partnership—**

The Companies strongly support the NIOSH-MSHA Diesel Exhaust Health Effects Partnership. We are also pleased that the first meeting of the Partnership has been scheduled in Pittsburgh on December 8. The Companies plan to actively participate in that meeting.

### **The NIOSH Diesel Exhaust Risk Assessment—**

The Companies understand that NIOSH is also at work on a diesel exhaust risk assessment ("DERA"). The Companies plan to work, on mutually advantageous terms, with the IMA-NA Diesel Exhaust Task Force on the DERA, including, to begin, a meeting with the DERA team to invite them to tour our mines and to begin educating them about the underground coal mining industry. We will also remind the DERA team that we hope and expect them to fully adhere to and abide by landmark public rulings on what dates and how often the DERA may be subject to public review and comment.

Thank you for the opportunity to comment on the RFI. I am available to answer any questions you may have.

Sincerely yours,



Edward M. Green  
Counsel for the Companies

Attachments