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Comment On: MSHA-2018-0016-0111
Safety Program: Surface Mobile Equipment

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Comment from Pennsylvania Coal Alliance

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General Comment

See attached file(s)

Attachments

Pennsylvania Coal Alliance Comments on the Safety Program of Surface Mobile Equipment Docket No MSHA 2018 0016

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November 8, 2021

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VIA ELECTRONIC SUBMISSION

RE: Safety Program: Surface Mobile Equipment, Docket No. MSHA 2018-0016, RIN 1219-AB91

On behalf of the members of the Pennsylvania Coal Alliance ("PCA"), please accept the following comments on the proposed rule concerning safety programs for surface mobile equipment, Docket No. MSHA 2018-0016. The PCA believes the proposed rule could lead to meaningful improvements over the existing rule and result in significant safety advances if modified as outlined in the below comments.

The PCA is the principal trade organization representing underground and surface bituminous coal operators in Pennsylvania as well as other associated companies and businesses that rely on coal mining and a strong coal economy. Nationally, Pennsylvania is the third largest coal producing state, and in 2019 PCA member companies produced over 90 percent of the bituminous coal mined in Pennsylvania.

The PCA has a significant interest in the proposed rule. PCA members include large longwall mines with extensive surface areas for cleaning plants and coal refuse disposal areas, underground coal mines which utilize continuous miners and similarly maintain surface preparation plants and refuse disposal areas, and surface coal mines that utilize significant numbers of surface mobile equipment. All of PCA's producer member operations would be subject to the rule, as well as many of PCA's manufacturing and service provider members that frequent operations to service the mines.

In general, the PCA supports the adoption of a rule requiring an operator to adopt a program to address the safety of mobile equipment. The safety and well-being of the hard-working men and women in Pennsylvania's coal industry is of the utmost importance, and this process is an appropriate way to address mobile equipment accidents in surface mines and surface areas of underground mines. While this approach is more effective than a prescriptive approach requiring the implementation of technologies that may or may not be effective or feasible at certain operations, aspects of the proposed rule could be improved with some modifications.

Of particular concern is the breadth of the proposed rule. In part this appears to be caused by a focus on technology which removes the human error from the accident equation and focuses on the portion of accident causation that is most difficult to address. Further, there is extensive overlap between existing standards and the proposed rule, and overlap with other agencies, which is evident from the proposed rule's definitions. As such, the PCA urges MSHA to narrowly focus the rule on developing technology.

The proposed rule's definition of "surface mobile equipment" is exceedingly broad and covers a wide array of surface mobile equipment, including equipment such as screening plants and portable crushers that may be incorporated into the definition but generally are not factors in accidents covered by the movement of equipment. Also of note, the definition includes track-mounted or rail mounted equipment which, even on mine sites, may be regulated by the Federal Railroad Agency, not MSHA, and may not be under the control of the operator.

The PCA suggest the definition of surface mobile equipment be modified to read as follows:

> *"Surface mobile equipment means wheeled, track-mounted, or rail-mounted equipment, excluding belt conveyors, capable of moving under its own power that transports people, equipment, or materials at surface mines and in surface areas of underground mines."*

In addition, the proposed rule overlaps with several other MSHA rules. Certain requirements of the proposed rule are duplicative of existing standards in Part 77 and Part 48. In the civil penalty context, the Review Commission has held that citations are impermissibly duplicative if they do not "impose separate and distinct duties on an operator." See Western Fuels-Utah, Inc., 19 FMSHRC 994, 1003 (Rev. Comm. June 1997) (citing Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 378 (Rev. Comm. March 1993); Southern Ohio Coal Co., 4 FMSHRC 1459, 1462-63 (Rev. Comm. Aug. 1982); El Paso Rock Quarries, Inc., 3 FMSHRC 35, 40 (Rev. Comm. Jan. 1981)). An impermissibly duplicative citation must be vacated. See Western Fuels-Utah, 19 FMSHRC at 1005, and analogously, in the rulemaking context, a provision of a proposed rule that is duplicative of an existing regulatory requirement should be stricken. Such is the case with respect to several of the provisions in the Proposed rule, including:

- Proposed Section 77.2003(a)(2) would require an operator's safety program to "develop and maintain procedures and schedules for routine maintenance and non-routine repairs for surface mobile equipment." 86 Fed. Reg. at 50511 and 50512. Subpart Q of 30 C.F.R. Part 77 includes extensive rules that address loading and haulage including traffic controls, transportation of persons, berms, inspection and maintenance and operation. See 30 C.F.R. §77.1600-77.1607. Existing Section 77.1600 already requires that mobile equipment be inspected before use, and defects affecting safety be recorded and reported. Thus, proposed Section 77.2103(a)(2) is duplicative of existing Section 75.1600-77.1607. Proposed 77.2103(a)(2) should therefore be stricken from the proposed rule. The proposed rule should focus on developing technology, not maintenance.

- Proposed Section 77.2103(a)(4) would require an operator's safety program to address "train[ing of] miners and other persons at the mine necessary to perform work to identify and address or avoid hazards related to surface mobile equipment." 86 Fed. Reg. at 50512. However, existing task training regulations already impose these requirements. Under Part 48, task training must include "[h]ealth and safety aspects and safe operating procedures for work tasks, equipment, and machinery." 30 C.F.R. §§ 48.7(a)(1) and 48.27(a)(1). Thus, the provision in proposed Section 77.2103(a)(4) is duplicative of existing task training provisions as both impose duties with respect to training miners on hazard identification and safe practices related to mobile equipment tasks. Surface mobile equipment hazards are routinely addressed in such training. It is not necessary to include a provision in the mobile equipment plan with respect to training and suggest that this reference be deleted from the proposed rule.

As MSHA is aware, over the years ventilation and roof control plans have evolved to include topics covered by mandatory standards which creates the potential for double citations or conflict between the plan provisions and the standards. This also tends to lead to confusion and inconsistency. The proposed rule should focus on the evaluation of developing technology and the testing at mines of such technology and not address the topics covered by Part 77 and Part 48.

Moreover, the PCA is concerned that the plan required by the proposed rule will necessitate the inclusion of procedures and schedules for "routine maintenance." This requisite is of particular concern as some operators have computerized maintenance software which addresses routine maintenance and these systems are necessarily complex and electronically based. The PCA also believes that this provision is overly broad and, if retained in the rule, should be limited to "safety related maintenance items." Most routine maintenance is directed to the long-term operability of a particular machine and is not a factor in potential hazards. Further, the rule and preamble should be clear in that the operator determines the maintenance schedules which are not necessarily based on a manufacturer's recommendations. Manufacturer's recommendations may not be applicable to specific situations or operations and often include provisions that are primarily directed to the defense of liability for the manufacturer rather than sound, effective and safe operations.

Adopting manufacturer's maintenance plans could be recommended as a best practice or as an option which operators may choose when creating their plans but should not be mandated as it could result in unintended negative consequences. For example, many operators have alternative products used in their maintenance procedures – e.g., oil changes – that do not follow manufacturer's recommendations but provide the same safety benefits in a more efficient manner. Requiring operators to follow manufacturer's recommendations would open companies in such situations to citations, limit their options, not necessarily have a positive safety effect and increase the economic burden on operations rather than increase safety. Furthermore, requiring operators to follow manufacturer's recommendations would make enforcement of the rule unrealistic for inspectors, and could results in spending significant time poring over paperwork, owner's manuals for various equipment of differing makes and models, and cross-referencing them with maintenance records. Lastly, given the age of some mobile equipment, such recommendations and manuals may no longer be available.

In addition, any reference to "non-routine" maintenance should be deleted. It is not possible to predict or plan for maintenance that occurs on a "non-routine" basis. By its very nature, such maintenance is not predictable.

The PCA also contends that the development of new and improved technology for use on mobile equipment should occur as a partnership between an operator, MSHA and suppliers, akin to what transpired with respect to proximity detection in underground coal mines. Most operators do not have the resources to develop and evaluate new technologies on a continual basis, therefore the provision concerning annual review should be replaced with language indicating that, if requested by MSHA, an operator shall cooperate in the evaluation of such technology to the extent it is feasible to do so.

Furthermore, the proposed rule creates the position of a "Responsible Person" to oversee compliance, selection of methods, and development and revision of a plan. Undoubtedly this provision makes an individual responsible for violations under Section 110(c) of the Federal Mine Safety and Health Act, but also creates responsibility for such a broad range of areas that it would not be possible for one person to perform these duties. The PCA believes that, at large operations, the organizational structure would have to be changed to accommodate such a position and additional staff that would be necessary. The

duties of such a position are not in any way comparable to that of a "Responsible Person" on a shift in an underground coal mine under 30 C.F.R. §75.1501. The evaluation and selection of technology is a multi-disciplinary task that would normally require, even at smaller operations, a number of people to be involved. The PCA suggests that the words "Responsible Person" be replaced throughout the proposed rule by the "operator." This sort of approach is common in the standards related to other sorts of plans such as ventilation, roof control and surface ground control plans. See, e.g., 30 C.F.R. §§75.370 and 75.220.

Further, it must be recognized by the agency that adoption of new or special technology is a matter of effectiveness and feasibility. An operator must be free to apply a risk management approach to use of new technology. The rule should specifically include a provision that addresses that issue.

The PCA suggests the rule be modified to permit the testing of new technology for a year without penalty. Currently, if additional safety equipment is added to a machine and the operator decides it is not effective and removes it or disables it, it can receive a citation for a safety defect under 30 C.F.R. §75.1725(a). This "no good deed goes unpunished" approach actively discourages operators from adopting new technology.

We would propose that 30 C.F.R. §77.2103 be revised to read:

(a) The operator shall develop and implement a written safety program that includes actions the operator would take to:

(1) Identify and analyze hazards and reduce the resulting risks related to movement and the operations of surface mobile equipment;

(2) Cooperate, to the extent feasible, with the efforts of public agencies and manufacturers to develop newly emerging technologies to enhance surface mobile equipment safety and determine whether it is feasible and effective to adopt such technology.

(3) The testing of such equipment is permitted on an interim basis and shall not result in enforcement action if its operation is determined not to be feasible. Operators shall be permitted to test current technology for a period of up to a year to determine feasibility of adoption without penalty.

(4) Develop procedures and schedules for routine maintenance related to the safety functions of equipment. Such plans may incorporate by reference such features or programs as an operator might have for maintenance and repair.

(5) The operator shall evaluate the written safety program as mining conditions or practices change or accidents, as defined in 30 C.F.R. Part 50.2.

Lastly, an additional, significant change is needed to the proposed rule regarding the use of contractors. "Mine operators" in 30 C.F.R. §77.2103 and "operators" in Section 77.2102 make no reference to contractors, and this omission must be addressed for two reasons. First, contractors are operators in their own right under the Act. Section 3(d) of the Mine Act defines an "operator" to mean "any owner,

lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d). Likewise, MSHA's regulations at 30 C.F.R. Part 45, which sets forth procedural requirements for independent contractors working at mine sites, state that such requirements exist "to facilitate implementation of MSHA's enforcement policy of holding independent contractors responsible for violations committed by them and their employees." 30 C.F.R. § 45.1. Therefore, independent contractors, as "operators," should be required to meet the requirements of proposed section 77.2102 and 77.2103, et seq., including the development of their own safety program. Contractors often bring mobile equipment onto mine property for jobs such as blasting, reclamation and other activities. It is not reasonable to expect a production operator to assume responsibility for the maintenance of such equipment under its plan or to include it in the plan, but contractors may have more limited roles that require recognition. The rule should clarify that the contractors who bring mobile equipment on site should be required to have their own plan and to provide it to the production operator.

The PCA suggests that the following language be included under 30 C.F.R. §77.2100:

> *"This rule also applies to contractors who bring surface mobile equipment onto a mine site. It does not apply to contractors who supply only personnel to a mine site or who are present at a mine site for a limited purpose or to transport work tools or parts. Contractors subject to the requirement to develop a plan shall provide such plan to the operator."*

The PCA appreciates the opportunity to comment on the proposed rules and hope that the agency considers our comments and make the modifications we have proposed.

Sincerely,

Rachel Gleason

Rachel Gleason
Executive Director
Pennsylvania Coal Alliance