

March 28, 2011

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Ms. April E. Nelson  
Acting Director  
Mine Safety and Health Administration  
Office of Standards, Regulations, and Variances  
1100 Wilson Boulevard  
Room 2350  
Arlington, VA 22209-3939

Re: Comments of Murray Energy Corporation on MSHA's Proposed Rule on Examinations of Work Areas in Underground Coal Mines For Violations of Mandatory Health or Safety Standards: RIN 1219-AB75

Dear Ms. Nelson:

Introduction and Overview

Please find below the comments of Murray Energy Corporation ("MEC") on MSHA's Proposed Rule on Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards, published in the Federal Register for December 27, 2010. 75 Fed. Reg. 81,165. MEC is the largest privately owned coal company in America, producing approximately 30 million tons of bituminous coal annually that provides affordable energy to households and businesses across the country. MEC's subsidiaries operate eight underground and surface mining operations, plus 40 subsidiary and support companies. Transporting coal via truck, rail, and waterways, MEC operates the second-largest fleet of longwall mining units in the country. With a support team of 3,000 hard-working, dedicated, and talented employees in six states, MEC's affordable high-quality coal is mined safely and efficiently, and is supplied to leading producers of electricity, both domestically and abroad.

For the reasons set forth in more detail below, MEC respectfully urges MSHA to withdraw this proposed rule. In short, we believe the proposal would:

- significantly change the general scope of examinations under the existing standards (contrary to the assertions in the preamble that the proposal would not do so);
- reduce the protection afforded miners by the existing standards in violation of § 101(a)(9) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. §§ 801, 811(a)(9) (the "Mine Act");
- result in wrong-headed policy for all of the reasons described in the preambles to the two earlier rulemakings on this issue in which the same concept was rejected by previous

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Administrations, which will therefore lead to substantial and unnecessary burdens on the underground coal mining industry, with mandatory workloads for mine examiners increasing significantly, accompanied by the real potential for concomitant increased liability for mine examiners under Mine Act § 110(c);

- cause many more citations to be issued by MSHA inspectors for no useful safety and health purpose, with the consequence of increasing the already staggering backlog of cases before the Federal Mine Safety and Health Review Commission; and
- violate a number of the President's executive orders and memoranda in connection with rulemakings like this proposal, including the requirements for an accurate regulatory economic analysis of the proposed rule.

We now turn to a more thorough discussion of each of the flaws identified above. Any of them alone should cause MSHA to withdraw this proposal. Their collective weight demands that the proposal must be scrapped.

#### **The Proposal Would Significantly Change the General Scope of Examinations Under Existing Standards**

The preamble to the proposed rule states that "MSHA does not intend that the proposal would significantly change the general scope of examinations under the existing standards." 75 Fed. Reg. 81,167. If that statement is accurate, then the proposed rule should be scrapped because it would be contrary to MSHA's purported intent, drastically changing how examinations are conducted and the amount of time they will consume. We say this because the proposed rule dramatically expands the mandatory duties imposed on mine examiners from checking for hazards to checking for "violations" of any mandatory health or safety standards, whether or not such a violation poses a hazard.

By way of background, the issue of working area examinations has been dealt with by previous Secretaries of Labor in different Administrations—those of Presidents Ronald Reagan, George H.W. Bush and Bill Clinton. We discuss these rulemakings in more detail below; but, by way of illustration of how the current proposal would significantly change the scope of mine examinations under the standards now in effect, we wish to point out that, in 1988, during the Reagan Administration, the Secretary proposed to change the language of the *interim* mandatory preshift safety standard that had been carried over from the Federal Coal Mine Health and Safety Act of 1969 (the "1969 Act") verbatim (now Mine Act § 303(d)(1), 30 U.S.C. § 863(d)(1)). During the development of *improved* mandatory safety standards, in the 1988 proposed revisions, the Secretary stated that "the preshift examination is not intended as a complete mine inspection." 53 Fed. Reg. 2,401 (Jan. 27, 1988).<sup>1</sup> Then, in the preamble to the final rule

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<sup>1</sup> Section 301(a) of the 1969 Act (now Mine Act § 301(a), 30 U.S.C. § 861(a)), provides: "The provisions of sections 302 through 318 of this title shall be *interim* mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by *improved*

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promulgated in 1992, during the Bush Administration, the Secretary stated that, "as proposed, *the final rule does not include a provision authorizing expansion of the preshift examination to include examination for violations of mandatory standards.*" 57 Fed. Reg. 20,894 (May 15, 1992) (emphasis added). The Secretary reasoned:

Most "hazards" are violations of mandatory standards. MSHA believes that authorizing the district manager to require the preshift examination to include examination for other hazards ensures that preshift examinations are tailored to provide the necessary protection for miners. *Also requiring the preshift examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination. The preshift examination is designed to concentrate the examiners [sic] efforts in those areas where they are most suitably applied.*

*Id.* (emphasis added). This key fundamental concern was repeated in the Clinton Administration's 1996 revised rule – *expressly rejecting* a proposed revision that would similarly have required preshift and weekly examiners to examine for violations – because, upon further consideration, *the Secretary again agreed that such an added requirement would distract mine examiners from their primary objective of examining for hazards.* See 61 Fed. Reg. 9,793 (March 11, 1996).

The current proposed rule would go even farther than any prior rule or even any proposed rule, by requiring not only the preshift and weekly examiner to examine for violations of mandatory standards, but also by mandating that the supplemental and on-shift examiners do so, and by making foremen responsible for recording all violations during normal operations. See 75 Fed. Reg. 81,175-76. Those latter proposed requirements were never even part of the interim mandatory safety standards in the 1969 Act. Moreover, whereas the 1994 proposed revision (that was rejected upon final promulgation in 1996) would have limited the examination requirement to only those violations "that could result in a *hazardous* condition," 59 Fed. Reg. 26,373, 26,378-79 (May 19, 1994) (emphasis added), the current proposed rule would impose no such limitation, and thus require the mine examiners – as well as mine foremen during regular work – to record *all violations, no matter how "technical" in nature.*

Basically, should the current proposal become law, mine foremen and other certified mine examiners will be preoccupied with hunting for any and all violations, *whether they present hazards or not.* Thus, the idea that the proposed rule will not "significantly change the general scope of examinations" is simply wrong, and is belied by the regulatory history of the

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mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act...." (Emphasis added.)

examination rules highlighted here and which we next review in more detail. For this reason alone (as well as others) the current proposal should be withdrawn.

**The Proposal Would Reduce the Protection Afforded Miners by the Existing Standards in Violation of Mine Act § 101(a)(9)**

The proposed rule would also violate Mine Act § 101(a)(9), inasmuch as it would “reduce the protection afforded miners” by the current standards. *See* 30 U.S.C. § 811(a)(9). The examination rules in existence from 1970 to 1992, adopted verbatim from the statutory language of § 303 of the 1969 Act, 30 U.S.C. § 863, required preshift examiners to examine for violations (as well as hazards), on-shift examiners to examine for hazards only, and weekly examiners to examine for “compliance with” mandatory standards (as well as hazards). *See* 30 C.F.R. §§ 75.303(a), 75.304, and 75.305 (1976), derived word-for-word from §§ 303(d)(1), (e), and (f) of the 1969 Act. As interim mandatory standards, the Secretary was authorized to improve upon them through rulemaking, *see* 30 U.S.C. §§ 811(a), 861(a), subject to the condition of Mine Act § 101(a)(9) that no such improved rule could reduce protection to miners.<sup>2</sup> This improvement the Secretary made in 1992.

In the 1988 preamble to the proposed rule, the Secretary stated in relevant part:

The proposed rule would clarify, reorganize, and update the existing ventilation standards that were promulgated more than 15 years ago. *Miner safety and health would be improved by providing standards for and encouraging the use of advances in ventilation technology and by upgrading the quality of examinations for hazardous conditions that are conducted in all mines.*

53 Fed. Reg. 2,382 (Jan. 27, 1988) (emphasis added). Regarding preshift examinations in particular, the 1988 preamble stressed the focus on hazard identification, *id.* 2,400-01, and expressly stated that not all violations needed to be noted and dangerous off because “*the preshift examination is not intended as a complete mine inspection.*” *Id.* 2,401 (emphasis added). The proposed rule for on-shift and weekly examinations also stressed hazard identification, *id.* 2,402-03, and the proposed weekly examination rule eliminated the requirement that those examiners also check for compliance with the mandatory standards. *See id.* 2,420.

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<sup>2</sup> Mine Act § 101(a)(9) provides: “No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard.” 30 U.S.C. § 811(a).

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When the final rule was promulgated in 1992, during the Bush Administration, the Secretary stated in the preamble:

The final rule revises the existing standards for coal mine ventilation in 30 CFR part 75 which were promulgated over 20 years ago. In developing the rule, the Agency reviewed each revision and deletion to provisions contained in existing standards as well as each new provision in the final rule to ensure that the level of protection provided miners by existing standards is not reduced. *In accordance with section 101(a)(9) of the Mine Act, the standards in the final rule do not reduce the level of protection afforded miners by the existing rules. In many cases, protection of miners' safety and health is enhanced by these revisions. For example, new standards that encourage the use of advances in ventilation technology and revised standards that upgrade the quality of examinations for hazardous conditions that are conducted in all mines improve protection for miners.*

57 Fed. Reg. 20,868 (May 15, 1992) (emphasis added).

As noted earlier, the final 1992 preshift rule discarded the requirement that examiners check for violations of mandatory standards, specifically because “*requiring the preshift examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination,*” and because “[t]he preshift examination is designed to concentrate the examiners *[sic]* efforts in those areas where they are most suitably applied.” *Id.* 20,894 (emphasis added). The on-shift rule never required examination for violations, so the issue was not addressed in that context in the 1992 rule. The weekly examination rule, however, which had required the examiner to check for “compliance” with mandatory standards, was also revised to reflect – as with the revised preshift rule – the Secretary’s increased appreciation for the need to focus such examinations on hazards so as not to get distracted with, and thus diminish safety because of, non-hazardous “violations.” On this point, the Secretary stated in the 1992 preamble:

The final rule does not specifically indicate that this examination must verify compliance with mandatory health or safety standards as under the existing rule, but the weekly examination for hazardous conditions conducted under the final rule inherently includes a determination of compliance with mandatory standards since ordinarily most hazardous conditions in a mine would result from a violation of a safety or health standard. *Requiring the examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination. This examination, like other examinations required by the final rule, is designed to concentrate the examiners [sic] efforts in those areas where they are most suitably applied.*

*Id.* 20,897 (emphasis added).

It is clear, therefore, that in revising the examination rules in 1992 pursuant to Mine Act § 101(a), the Secretary determined that it was in the interest of greater miner safety to do away with the distraction of the added and heavy burden placed on examiners to look out for all violations, and to require instead that they focus their attention on actual hazard identification. Having taken that step and expressly found that the 1992 rule enhanced the safety of miners, the Secretary cannot go back, and nothing in the preamble to the current proposed rule addresses why, all of a sudden, the old (*and discredited*) language of the 1969 Act now better promotes safety for miners.

We say discredited because, indeed, we have been here before. In 1994, during the Clinton Administration, the Secretary initially proposed reverting, at least partially, to a rule that would require preshift and weekly examiners to examine not only for hazards but also for violations of mandatory standards. But even that proposal recognized the central aim of using examinations to identify hazards, by limiting the “violations” that had to be recorded to those that “could result in a hazardous condition.” 59 Fed. Reg. 26,373 (discussion of proposed preshift examination rule), 26,378-79 (discussion of proposed weekly examination rule), 26,394-95 (text of proposed preshift examination rule), 26,396-97 (text of proposed weekly examination rule).

This 1994 proposal was not adopted in the final rule promulgated in 1996. Just as in the Bush-era 1992 final rule, the preamble to the Clinton-era 1996 final rule noted comments recommending the deletion of that requirement of the proposed preshift examination rule because, among other things, it would inevitably cause mine examiners to shift their focus from “true hazards to noncompliance.” 61 Fed. Reg. 9,793 (Mar. 11, 1996). Assistant Secretary McAteer agreed, stating:

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The preshift examination requirements in the final rule are intended to *focus the attention of the examiner in critical areas*. This approach is consistent with the fundamental purpose of preshift examinations which is to discover conditions that pose a hazard to miners. *MSHA is persuaded that to require examiners to look for violations that might become a hazard could distract examiners from their primary duties*. The final rule, therefore, does not adopt this aspect of the proposal.

*Id.* (emphasis added).

The same approach was taken in the final weekly examination rule. In the preamble, the Secretary noted the many objections to requiring mine examiners to shift their focus from hazards to "noncompliance," which would only serve as a "diversion of the examiner's attention away from key safety conditions to minor compliance issues." *Id.* 9,806. Thus, again, the Secretary was persuaded that retaining the focus on indentifying hazards was in the best safety interests of miners:

As discussed in the preamble to the 1992 rule, most hazards are violations of mandatory standards. *Requiring the examiner to look for all violations regardless of whether they involve a distinct hazard could distract the examiner from the more important aspects of the examination*. Despite an attempt in the proposal to limit the scope of the examination for noncompliance to situations that, "could result in a hazardous condition," commenters expressed a high level of misunderstanding. Although a similar requirement existed between 1970 and 1992, MSHA generally did not broadly apply the standard. After consideration of all comments and a review of the history since the current standard became effective, *MSHA concludes that the existing standard is appropriate and best serves the objective of giving examiners clear guidance for making effective examinations*. Accordingly, the proposal for examinations to include noncompliance with mandatory safety and health standards is not adopted in the final rule."

*Id.* (emphasis added).

Given this regulatory history, especially the repeated past findings of previous Secretaries of Labor in different Administrations (on both sides of the political aisle) that requiring mine examiners to examine not only for hazards but also for violations of mandatory standards would distract from the central aim of examinations and thus make examinations less effective, thereby exposing all miners to greater hazards, and to add for the first time a violations-identification and recording requirement for supplemental and on-shift examinations and for foremen during their regular work routines, would clearly reduce miner safety and thus run afoul of Mine Act § 101(a)(9). The December 2010 proposed rule effectively adds back the "distracting" element

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that the 1992 rule eliminated and which the 1996 rule affirmed should stay eliminated. Thus, the new 2010 proposal would, contrary to law, reduce the level of safety currently afforded to miners. Thus, even if not otherwise misguided, the proposed rule must be withdrawn because it violates the Mine Act.<sup>3</sup>

**The Proposal Would Result in Wrong-Headed Policy, Unnecessary Burdens on the Underground Coal Mining Industry, Significantly Increased Workloads for Mine Examiners, and Over-Recording Because of the Real Potential for Criminal Liability for Mine Examiners Under Mine Act § 110(c)**

We want to emphasize that irrespective of the illegality of the proposed rule under § 101(a)(9), as discussed above, the proposed rule is also bad policy for all of the reasons noted in the preambles to the 1992 and 1996 final rules. Nothing has changed that would make adding the demands of the proposed rule to the critically important requirements of the jobs of mine examiners and mine foremen any less distracting than already determined by previous Secretaries of Labor. Thus, the proposal would result in less safety for all underground coal miners. This is especially important to highlight because the preamble to the new proposal specifically states, in connection with review thereof by the Office of Management and Budget (“OMB”) under Executive Order 12,866: “The proposed rule raises novel, legal or policy issues and is therefore subject to OMB review.” 75 Fed. Reg. 81,168. MEC is pleased that MSHA recognizes the need for OMB to review this proposal. Promulgation of this proposal would, indeed, raise novel legal and policy issues. The rejection of these policies by the previous Administrations discussed above should serve as a beacon for both the current Secretary and for OMB on the proposition that the proposal should be rejected again.

The proposed rule is also overly burdensome. Conditions in underground coal mines that constitute “violations of mandatory health or safety standards” can often be very subjective in nature, and such conditions are not always hazardous in and of themselves. The Secretary recognized this in 1992, *see* 57 Fed. Reg. 20,894 (“MSHA recognizes that ‘technical’ violations of mandatory standards may not immediately endanger miners...”), and again in 1996. *See* 61 Fed. Reg. 9,806. Even in this new proposal, the preamble notes (in connection with “fix[ing] a violation”) that “it may take two days” to do so. 75 Fed. Reg. 81,167. The preamble goes on to say: “Assuming that the violation does not pose a hazard to miners, the two days would generally be considered reasonable.” *Id.* (emphasis added). And the contention can hardly be

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<sup>3</sup> MEC wishes to note here the statement of MSHA Assistant Secretary Joseph A. Main at the March 3, 2011, hearing, “Examining Recent Regulatory and Enforcement Actions of the Mine Safety and Health Administration,” held before the Subcommittee on Workforce Protections of the House Committee on Education & the Workforce. At that hearing, in connection with this proposed rule, Assistant Secretary Main said: “If implemented, this rule would reinstate requirements in place for about 20 years following passage of the 1969 Mine Act.” Main Statement at 13. True enough, but the Assistant Secretary ignores the judgments of his two predecessors who concluded that those requirements were outmoded and so distracting to the vital work of mine examiners that their elimination was warranted.



debated. For example, one might imagine a foreman driving in an underground vehicle and brushing momentarily against a mine rib such that his side mirror gets bent so that he can no longer see what is behind him on that side. Does he have to record that bent mirror as a violation of 30 C.F.R. § 75.1725(a) or can he just fix the problem and continue on his way?<sup>4</sup> Or what if one too many water sprays gets clogged so that the number of sprays required by the mine's ventilation plan is momentarily not functioning. Can the foreman or preshift examiner just stop and unplug one of the sprays, or must he record it as a violation of the ventilation plan mandated by 30 C.F.R. § 75.370? The term "violation," after all, admits of no exceptions.<sup>5</sup>

We recognize that, as stated in the preamble, the primary aim of the proposed rule is to make operators more proactive in identifying and correcting violations of those standards that are perennially among the most cited. See 75 Fed. Reg. 81,167. Clearly, though, the proposed rule is not limited to making examiners responsible for finding and recording only those violations that are frequently cited. Moreover, the concern with perennial violations is overstated, unfairly so. The most-cited standard in underground coal mines, year after year, for example – § 75.400 – is also the most subjective.<sup>6</sup> Coal and coal dust naturally "accumulate" as a result of the mining process. Technically, every operator is in violation the instant its cutter hits coal. Citations accumulate under this standard not so much because operators are not vigilant about routinely cleaning up their accumulations, but because it is simply impossible to keep the mine environment continually free of what an MSHA inspector who randomly shows up at the mine in between cleaning cycles considers to be a citable accumulation. The proposed rule will not change this, for § 75.400 accumulations or for any of the other most-cited standards – they are the most cited because, by their nature, they are the hardest to identify<sup>7</sup> given their often amorphous and subjective nature, and yet they require the most resources to remain in compliance, and this would continue to be true even with this proposed rule.

To be clear, we recognize that the standards most frequently cited stem from conditions that are often hazardous, or potentially so, and that is why operators are already vigilant in their

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<sup>4</sup> 30 C.F.R. § 75.1725(a) provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

<sup>5</sup> Determining what actually is, in fact and law, a violation is quite another matter, often depending on subjective judgments, line-drawing, and the latest policies and interpretations of the Agency.

<sup>6</sup> 30 C.F.R. § 75.400 states: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

<sup>7</sup> Another most-cited standard that MSHA lists is § 75.403, which requires the incombustible content of coal and rock dust be at least 80%. The naked eye cannot tell the difference between 79% (forbidden) and 80% (compliant) incombustible content. Examiners will have to record as violations any such "gray" area, even if actually compliant.

attention to such conditions during required mine examinations and at all stages of operation. But hazard identification and correction is a constant, ongoing process because the conditions giving rise to potential hazards are constantly developing within the ever-changing, dynamic underground environment, at the working sections and in more remote locations alike. Nothing is gained *from a safety standpoint*, however, by requiring examiners to go beyond hazard identification and correction and forcing them to record such conditions as “violations” *per se*. It will merely bog down examiners and other miners by requiring them to give undue attention to non-hazardous “violations,” and this in turn will have a significant impact on both the effectiveness of mine examinations, as well as production. At no clear gain to safety that we can identify, the proposed rule is very ill-conceived.

Moreover, the proposed rule subjects mine examiners – as the individuals who would now be specifically responsible for catching all violations in the examined areas – to liability under Mine Act § 110(c) far out of proportion to their traditional responsibilities to examine for hazardous conditions, and puts mine examiners between the rock of recording as “violations” conditions that neither he nor the operator may believe are violations at all and the hard place of individual liability for failing to record a violation subsequently alleged by an MSHA inspector.<sup>8</sup> Lost in this scenario – which is certain to arise sooner or later – will be whether the condition cited by MSHA as a violation poses a hazard at all. The Secretary should retain the current structure, allowing the examiner to do his job of examining for hazards, while the MSHA inspector enforces the law as he inspects for violations.<sup>9</sup>

The proposed rule also exposes the operator to a double-liability: if the examiner does not catch a violation that, upon subsequent inspection by MSHA, the Secretary believes exists, the operator will face two enforcement actions: a citation or order for the underlying “violation,” and a citation or order for an incomplete or inadequate examination as evidenced by the failure to record the “violation” as required by this proposed rule.

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<sup>8</sup> Mine Act § 110(c) provides, in part: “Whenever a corporate operator violates a mandatory health or safety standard...any director, officer, or agent of such corporation who knowingly...carried out such violation,...shall be subject to ... civil penalties, fines, and imprisonment.” Mine examiners are agents of corporate operators. It is considered a violation to conduct an inadequate examination, so if a mine examiner makes a judgment call to not record a condition that an MSHA inspector later considers in his subjective opinion to be a violation, the examiner would be open to the charge of knowingly violating this proposed rule and carrying out an inadequate examination. The upshot is that examiners will stop to record anything that remotely resembles a violation, or that they fear an aggressive inspector may deem to be one. As a result, the examination books will become defensively filled with potential violations by understandably liability-averse examiners and, as discussed *infra*, mine operators will be hard-pressed to contest citations predicated on these “admissions” of “violations.”

<sup>9</sup> Mine examiners are trained to find hazards, and not necessarily to be experts in all the standards at the same level as an MSHA inspector. Moreover, mine examiners are not privy to the latest interetative and enforcement policy nuances with which MSHA’s inspectors are armed.

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**The Proposal Would Cause Many More Citations to Be Issued by MSHA Inspectors for No Useful Safety and Health Purpose, With the Consequence of Increasing the Already Staggering Backlog of Cases Before the FMSHRC**

We are also very concerned that the proposed rule will lead to many more citations being issued by MSHA as a result of the “violations” required to be recorded under the five distinct examination or hazard-identification standards: preshift (§ 75.360), supplemental (§ 75.361), on-shift (§ 75.362), weekly (§ 75.364) and the general hazard-identification standard (§ 75.363). This concern is because Mine Act § 104(a) states that an MSHA inspector or investigator “shall” with reasonable promptness<sup>10</sup> issue a citation if he “believes” the operator “has violated” the statute or a regulation. 30 U.S.C. § 814(a). In other words, *it compels a citation on the mere belief that a violation occurred*, even though it no longer exists when he does his inspection. It stands to reason, then, that when an inspector reviews the “violations” recently recorded by the examiner, he or she will be obligated by § 104(a) to issue a citation for each such violation (or, worse, a citation or order under the unwarrantable failure provisions of § 104(d) – which also uses the term “shall”). See *Emerald Mines Co. v. Fed. Mine Safety & Health Review Comm’n*, 863 F.2d 51 (D.C. Cir. 1988) (inspector could issue an unwarrantable failure order for conditions that occurred outside of sight of inspector and had already been abated before inspector arrived at the mine).

Concomitantly, and further to OMB’s stated interest in “novel legal issues,” we are concerned about the due process implications of the proposed rule in light of the potential evidentiary effects of a “violation” being recorded by the examiner. In general, examiners lack authority to assess on behalf of the operator whether a condition was properly cited as a violation by MSHA for purposes of deciding whether to contest the resulting citation or order at the Federal Mine Safety and Health Review Commission (the “Commission”). It is the general counsel or another high-level officer who decides which violations to contest. This proposed rule, however, will force mine examiners into the role of making judgment calls as to whether a condition is a “violation,” which puts him in a very awkward and difficult position with his employer – essentially deputizing the examiner to do the enforcement bidding of MSHA. To add to that ill-considered situation is the very real possibility that, in doing so, the examiner will jeopardize the operator’s subsequent right to contest a violation at the Commission because the record of the violation will constitute an admission under the rules of evidence,<sup>11</sup> or the examiner will implicate himself if he records a violation that does not get corrected. This situation violates traditional notions of fairness and due process, and likely violates the right against self-

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<sup>10</sup> “This requirement [of reasonable promptness] could be construed to cover not only the inspection to citation time lag but the *violation to citation* span as well.” *Emerald Mines Co. v. Fed. Mine Safety & Health Review Comm’n*, 863 F.2d 51, 59 (D.C. Cir. 1988) (emphasis added).

<sup>11</sup> Federal Rule of Evidence 801(d)(2)(D) states: “A statement is not hearsay if – the statement is offered against a party and is a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.” Mine examiners are agents of corporate operators.

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incrimination protected by the Fifth Amendment to the U.S. Constitution, given the potential for criminal liability under the Mine Act.

In light of these concerns, and to the extent the Secretary does not rescind the proposed rule outright (as she should), we urge the Secretary to, at the very least, modify the respective proposed rules to state that “violations that are recorded in the examination books and which are corrected within a reasonable time will not be cited or penalized as violations for purposes of Mine Act §§ 104 and 110.” If the Secretary’s aim truly is to make operators more proactive in eliminating hazardous conditions and reducing violations, then we see no reason why the Secretary would not revise the rule as we recommend. MEC urges the Secretary and OMB to carefully consider this recommendation.<sup>12</sup>

The purported basis for the rule is that “to assure optimum safety of miners, it is imperative that operators find violations of health or safety standards, correct them, and record corrective actions taken.” 75 Fed. Reg. 81,167.<sup>13</sup> As noted, MSHA specifically purports to be concerned with earlier detection of the perennially most cited standards. *See id.* The proposed rule, however, is a poor means of accomplishing that objective. In addition to the unfairness of placing this burden fully on the shoulders of mine examiners, and the distractions that the proposed rule would cause for the reasons noted above and by prior administrations, it seems the laudable objective of optimizing miner safety – already the objective of all existing regulations and, indeed, the “first priority” of the Mine Act and operators (Mine Act § 2(a)) – could more effectively be addressed (if MSHA believes more rulemaking is really the only way to go) through the rulemaking listed on the agency’s December 20, 2010, Regulatory Agenda entitled “Safety and Health Management Programs for Mines.” 75 Fed. Reg. 79,589. Indeed, in that

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<sup>12</sup> Even the UMWA recognizes the legitimacy of this request in its comments on the proposed rule, where it states:

[W]e think it would improve the rule, if it made clear that MSHA would not write citations based on violations that an operator’s examiner identified, so long as appropriate abatement efforts are made. That is, the fact that a violation once existed should not give rise to a citation if the operator addresses it once it is identified. Making this clarification would eliminate concerns some operators expressed.

United Mine Workers of America, Comments on the Mine Safety and Health Administration’s Proposed Rule: Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards, “RIN 1219-AB75” at 3.

<sup>13</sup> *See also*, Assistant Secretary Mains’ March 3rd testimony: “The [Upper Big Branch] disaster highlighted the need to ensure that mine operators take seriously their *obligation to find and fix the hazards in their mines, even when MSHA is not looking over their shoulders.*” Statement at 13 (emphasis added). MEC wholeheartedly agrees with this statement and that is precisely what the current mine examination rules require.

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Regulatory Agenda, this rule (yet to be proposed) is specifically identified as a "complement" to the subject proposal. *Id.*

For all the reasons identified in this section of our comments, the proposal should be withdrawn.

**The Proposal Would Violate a Number of the President's Executive Orders and Memoranda on Rulemakings, Including the Requirements for an Accurate Regulatory Economic Analysis of the Proposed Rule**

Piling on the responsibilities of mine examiners in the manner the proposed rule would demand is unwise for all of the reasons noted, and contradicts the spirit, if not the letter itself, of President Obama's new Executive Order ("E.O.") 13,563, "Improving Regulation and Regulatory Review," which stresses the desire of this Administration to regulate industry in the least burdensome manner and to take into account "the costs of cumulative regulations." *See* 76 Fed. Reg. 3,821 (Jan. 21, 2011). E.O. 13,563 also directs, in § 6 (*id.* 3,822), each federal agency to develop a preliminary plan and submit it to the Office of Information and Regulatory Affairs within 120 days of January 21, 2011, under which the agency will periodically review its existing significant regulations to determine whether any of them "should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives." *Id.*

MEC strongly recommends that, in light of all the new regulatory requirements that have been imposed on the underground coal mining industry since enactment of the MINER Act in June 2006, most of which required complex, technology-forcing, and costly new mandatory safety standards, as well as the new mandatory standards both promulgated, proposed, and contemplated by the Agency's current regulatory agenda since this Administration took office in January 2009, that the time is more than ripe for MSHA to carry out the review required by E.O. 13,563. We respectfully request, pending this review, that a moratorium on new MSHA regulations be instituted; and, specifically, that this current proposal not only not be promulgated pending preparation of that cumulative regulatory review, but also that the comment period on this proposal be reopened for additional public input following the preparation and publication of that review. MEC also urges that public comment be solicited on the cumulative regulatory review itself.

With regard to the analysis offered in the preamble in connection with E.O. 12,866, "Regulatory Planning and Review," MEC submits that the Secretary's rationale in the "Benefits" section of the preamble is extremely poorly reasoned. According to the Secretary, the proposed rule could have prevented nine mine fatalities between 2005 and 2009. *See* 75 Fed. Reg. 81,169. But a parsing of the underlying rationale belies that conclusion. First, the Secretary looked at 15 fatalities that stemmed from situations in which the operator was cited for violating one of the examination rules. *See id.* The Secretary states "these fatalities involved hazardous conditions and should have been prevented by a proper examination in accordance with the existing standards," but, unfortunately, "the mine examiners did not identify the conditions as being hazardous prior to the fatal accidents." *Id.* We submit the problem, therefore, was improper examinations under the existing rules. It does not justify the proposed requirement to identify

Ms. April E. Nelson  
March 28, 2011  
Page 14

and correct all violations of mandatory health or safety standards, regardless of whether those violations pose a hazard.

The preamble goes on, however, to note that MSHA found violations of mandatory standards (other than the improper examination itself) in nine of those 15 fatality cases. *See id.* This, according to the Secretary, shows that the proposed rule could have saved those nine lives. But this is pure sophistry. The problems in each case, according to the Secretary herself, were the hazardous conditions, and the hazardous conditions were something that the examiners in those cases were required to spot and correct under the existing rules. Moreover, assuming for the sake of argument that the examiners in those cases truly did fail to perform as required under existing law, the Secretary cannot say – nobody can – that had those hazards been spotted and corrected, the resulting fatalities could not have been prevented. The Secretary is posing speculation as fact to support her proposed rule, but the logic is not there to support it.

Nor is the logic – or, indeed, any facts at all – there to support the Secretary’s opinion that three additional deaths could have been prevented during the same five-year period had her proposed rule been in place. *See id.* The preamble states that the Secretary reviewed fatal investigation reports not stemming from improper examinations, and that she also reviewed 10 health and safety standards that are frequently the most-cited standards. It then states, without any analysis or additional information, that “[b]ased upon the Agency’s review of these reports, MSHA determined that three additional fatalities could have been prevented by the proposed rule by identifying violations of mandatory health or safety standards and making necessary corrective actions.” *Id.* But why? This is a hollow claim – unsubstantiated and conclusory. What is it about those fatality reports and those standards that lead to this conclusion? The preamble does not explain the Secretary’s conclusion or provide any basis for public or judicial review of the Secretary’s claim.

The bottom line is that the Secretary is using past examples of alleged improper examinations to support her opinion that the examination rules need to be changed, but the conclusion does not follow the premise. Examinations are not always properly executed. Indeed, the failure to conduct a proper examination is one of the most frequently cited violations by MSHA. Improper examinations can pose a serious safety risk to miners, and operators should take all necessary steps to correct the problem, whether it is more training, discipline, or hiring new personnel. But that the examination rules are not always properly followed does not mean that the examination rules are inherently flawed, and it is a fallacy that the only way to correct violations of existing regulations is to issue more regulations.

MEC filed a Freedom of Information Act (“FOIA”) request on March 17 to obtain copies of the MSHA reviews and analyses of the 15 fatality reports mentioned in the preamble to this proposal at 75 Fed. Reg. 81,169. *See* Attachment. To date, MSHA has not responded to this request for the analyses, despite the closing of the comment period, and has not extended the comment period in order to allow MEC or the industry to review these analyses.

Therefore, MEC has conducted its own independent review of the 11 fatality reports contained at MSHA’s on-line single-source page for this rulemaking, which can be found at <http://www.msha.gov/MineExams/MineExams.asp>. Based on this analysis, it is overwhelmingly

clear to MEC that MSHA concluded in each case that if the hazardous conditions that contributed to the root cause of these accidents had been properly identified and corrected, the fatalities would not likely have occurred. Adding a requirement to identify a "violation" in addition to a "hazard" would have merely been duplicative and would not have prevented any of the fatal accidents upon which MSHA relies to justify the benefits of this proposed rule. To summarize MEC's independent review of those reports:

**Fatal Accident #1: Harmony Mine.** According to MSHA's fatality report, the Acting Section Foreman was ignoring the roof control plan at the time the accident occurred, and directing other miners to do the same. The foreman "either did not recognize the *hazardous* [roof] conditions that were present during his examinations or chose to ignore them." (Emphasis added.) Adding a requirement to look for violations would not have saved this foreman who chose to stand under unsupported roof.

**Fatal Accident #2: Maverick Mining Company, LLC – Mine #1.** As MSHA's accident report concludes, "The accident resulted from *failure to identify hazards.*" (Emphasis added.)

**Fatal Accident #3: Aracoma Alma Mine #1.** According to the conclusions of MSHA's accident report, numerous causes contributed to the fire and deaths, including the failure of the AMS operator to withdraw miners until almost a half hour after the the AMS generated a CO alarm signal. According to MSHA's fatality report, the contributory factor of stoppings that had been removed without installation of proper ventilation air locks should have been identified during an examination as a hazard: "Examinations of the mine were inadequate and failed to identify the lack of separation between the primary escapeway and belt air course."

**Fatal Accident #4: Jacob Mining Company LLC – No. 1 Mine.** As MSHA's fatality report concludes, "A pre-shift examination for *hazardous* conditions was not conducted, which, if conducted properly, *would have identified* and corrected the improperly installed roof supports." (Emphasis added.)

**Fatal Accident #5: Tri Star Coal L.L.C., No. 1.** As MSHA's fatality report states, "The accident occurred because mine management failed to ensure adequate examinations were being conducted to identify and correct *hazardous roof conditions.*" (Emphasis added.)

**Fatal Accident #6: Sycamore Mine No. 2.** While the fatal accident report says "[n]o hazardous conditions were reported" during the preshift and on-shift examinations, the report makes no indication that the hazardous conditions or any violations existed at the time the examinations were conducted. Rather, the report concludes that, "[t]he accident resulted from failure to follow an existing procedure for maintaining haulageways free of extraneous material and a lacking procedure or policy requiring physical protection for scoop operators." Thus, even assuming the extraneous planking material was in the haulageway when the previous examinations occurred, it should have been recognized as a hazard.

**Fatal Accident #7: Jim Walter Resources, Inc. – No. 7 Mine.** As MSHA's fatality report concludes, "The accident occurred because the miner traveled in an area where *hazardous* roof

conditions were present due to the deterioration of the mine roof and installed roof support.” (Emphasis added.)

Fatal Accident #8: Rockhouse Energy Mining Company – Mine #1. As MSHA’s fatality report states, “*Hazards* existing in roadways and travelways were not identified during mine examinations.” (Emphasis added.) Alternatively, the hazard might not have existed when the examination was conducted. Either way, hunting for violations would have been duplicative of hazard identification.

Fatal Accident #9: South Central Coal Company, Inc., South Central Mine. According to MSHA’s fatality report, the accident victim was traveling in an area of unsupported roof, which is a hazard. Also, “[d]ue to the *hazardous condition* noted and the accumulation of water . . . an additional examination for safety purposes should have been made to check for correction of the *hazardous conditions* prior to the breakthrough into the unsupported area. This additional examination was not made.” (Emphasis added.)

Fatal Accident #10: Tracy Lynne Rosebud Mining Co. According to MSHA’s fatality report, the accident occurred as a result of the operator’s failure to address the “obvious defective roof condition,” which was a hazard that should have been reported, but rather “*hazardous conditions* were not addressed or recorded in the preshift record book.” (Emphasis added.)

Fatal Accident #11: NEWCO #1 Mine Sunrise Coal Company, LLC. According to MSHA’s fatality report, the accident occurred because the operator failed to recognize the presence of a drag fold (horseback) in the roof. This adverse roof condition represented a hazard when not properly dealt with that should have been addressed by the existing examination regulations.

In summary, although MSHA has failed to turn over its analysis of these fatal accident reports, MEC’s review of those reports show that MSHA concluded for each that either (a) the existing examination regulations could and should have prevented the noted accidents had the operators complied with those examination regulations through both identifying and actually correcting hazards, or (b) some of the hazards may not have even been present when the previous examination(s) occurred. Thus, adding a requirement to examine for violations of mandatory safety or health standards (including non-hazardous violations) would not have prevented these fatalities.

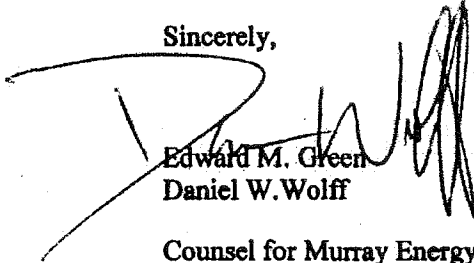
MEC also believes that the analysis of benefits contained in the preamble is greatly overstated; and that the compliance costs are vastly understated. The benefits-costs analyses poorly account for the impact of the proposed rule on production, and totally fail to consider that many mines operate at full capacity.



Ms. April E. Nelson  
March 28, 2011  
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In conclusion, MEC appreciates the opportunity to comment on this proposal. We urge that the proposed rule be withdrawn.

Sincerely,

A handwritten signature in black ink, appearing to be a combination of 'E. Green' and 'D. Wolff', written over a large, stylized flourish that starts with a large loop on the left and extends to the right.

Edward M. Green  
Daniel W. Wolff

Counsel for Murray Energy Corporation

Attachment



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

March 17, 2011

1079:llf

**FREEDOM OF INFORMATION ACT REQUEST**

**Via Fax and Email**

April E. Nelson  
Acting Director  
Office of Standards, Regulations, and Variances  
Mine Safety & Health Administration  
1100 Wilson Boulevard, Room 2350  
Arlington, VA 22209-3939

Re: Freedom of Information Act Request re Analysis of 15 Fatalities Described in the Preliminary Regulatory Economic Analysis for MSHA's Proposed Rule on Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards: RIN 1219-AB75

Dear Ms. Nelson:

Further to our exchange of emails on March 15 and 16, 2011 (copy enclosed), the purpose of this letter is to request, pursuant to the Freedom of Information Act, a copy of the "Analysis of the 15 Fatalities" identified in MSHA's preliminary regulatory economic analysis ("PREA") published in the *Federal Register* for December 27, 2010 as part of the preamble for the Agency's proposed rule on "Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards." 75 Fed. Reg. 81165, 81168.

More specifically, at 75 Fed. Reg. 81169 in the "Benefits" portion of the PREA, MSHA states that to estimate the potential benefits of the proposed rule:

MSHA reviewed all 64 fatal accident investigation reports from 2005 through 2009. . . .

Over the five year review period, there were 91 fatalities in underground coal mines. Of this total, the investigation reports for 15 of the fatalities specifically listed violations of the preshift, supplemental, on-shift, or weekly examinations as contributing factors to the accidents . . . . *After analysis of the 15 fatalities* MSHA determined that nine of them involved violations of mandatory health or safety standards and could have been

April E. Nelson  
March 17, 2011  
Page 2

prevented by a proper examination in accordance with the proposed rule.

(Emphasis added).<sup>1</sup>

While appreciating the assistance provided me in our exchange of emails, the preamble language of the PREA specifically refers to an "analysis of the 15 fatalities." Unless that analysis, like the Goddess Athena sprang from the forehead of Zeus, MSHA documents must exist supporting what would otherwise be unsupported and purely conclusory statements in the preamble. This FOIA request seeks to obtain the "analysis of the 15 fatalities" specified at page 81169 of the *Federal Register* publication of the proposed rule, and all MSHA documents prepared in development of this analysis.

In light of the current March 28 deadline for submittal of comments on this proposed rule, and because we believe the documents requested herein are readily retrievable by your office, *we ask that you expedite this FOIA request.* We also wish to renew the request I made in our email exchange for an extension of the comment period until 15 days after you furnish to me the document(s) requested in this FOIA request.

Please send a response to this letter directly to me at the following address:

Edward M. Green  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, NW  
Washington, DC 20004

Should you need to reach me to discuss any aspect of this request, please call me at (202) 624-2922; or email me at [egreen@crowell.com](mailto:egreen@crowell.com).

Sincerely,



Edward M. Green

Enclosure

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<sup>1</sup> Of the 64 fatal accident investigation reports mentioned in the preamble, a number of them involved multiple fatalities.

*Crowell & Moring LLP*  
*1001 Pennsylvania Avenue, NW | Washington, DC 20004*  
*P - 202-624-2961 | F - 202-628-5116*  
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*Admitted only in California and New York*  
*Attorney-Client | Work Product Privilege | Confidential*

**Green, Edward**

---

**From:** Green, Edward  
**Sent:** Wednesday, March 16, 2011 2:46 PM  
**To:** Nelson, April E - MSHA  
**Subject:** RE: Reports were on website

Thanks for your help.

**From:** Nelson, April E - MSHA [mailto:[nelson.april@DOL.GOV](mailto:nelson.april@DOL.GOV)]  
**Sent:** Wednesday, March 16, 2011 2:33 PM  
**To:** Green, Edward  
**Subject:** RE: Reports were on website

Ed, I answered that question already to the best of my ability. The analysis is explained in the preamble. I need to turn my attention to a number of other pressing issues now.

Sincerely,  
April

**From:** Green, Edward [mailto:[EGreen@crowell.com](mailto:EGreen@crowell.com)]  
**Sent:** Wednesday, March 16, 2011 2:07 PM  
**To:** Nelson, April E - MSHA  
**Subject:** RE: Reports were on website

OK April re the 12 fatalities. And we will prepare comments. But are you telling me there is no written MSHA analysis as specifically stated in the preamble?

Ed

**From:** Nelson, April E - MSHA [mailto:[nelson.april@DOL.GOV](mailto:nelson.april@DOL.GOV)]  
**Sent:** Wednesday, March 16, 2011 2:02 PM  
**To:** Green, Edward  
**Subject:** RE: Reports were on website

Ed, the 11 links contain reports for the 12 fatalities (2 for Aracoma). If you believe that the preamble insufficiently analyzes the fatalities, please feel free to submit a comment to that effect.

Sincerely,  
April

**From:** Green, Edward [mailto:[EGreen@crowell.com](mailto:EGreen@crowell.com)]  
**Sent:** Wednesday, March 16, 2011 12:34 PM  
**To:** Nelson, April E - MSHA  
**Subject:** RE: Reports were on website  
**Importance:** High

April, thank you for sending me the link. It contains 11 reports of investigation, not 12 (as you specify in your email of yesterday). And, with respect, perhaps you think MSHA's "analysis is explained in the preamble." But that begs the question. I would like to have a copy of the "analysis of the 15 fatalities" (75 Fed. Reg. 81,169) itself so we can review it to see if we agree with the analysis or not--and, if we don't, then we would comment on it.

Thank you for your courteous response to date. I'll look forward to receiving the analysis. Please let me know if you will send it or not.

Best wishes,

Ed

**From:** Nelson, April E - MSHA [mailto:nelson.april@DOL.GOV]  
**Sent:** Wednesday, March 16, 2011 10:30 AM  
**To:** Green, Edward  
**Subject:** Reports were on website

Hi, Ed. The reports already had been posted on the website as well, on the Exams single-source page. Here's the link. The analysis is explained in the preamble. I don't see a basis for an extension.

<http://www.msha.gov/MineExams/MineExams.asp>

Sincerely,  
April

**From:** Nelson, April E - MSHA  
**Sent:** Tuesday, March 15, 2011 5:58 PM  
**To:** 'Green, Edward'  
**Subject:** RE: MSHA Analysis of 15 fatalities in the PREA for Proposal on Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards

Good afternoon, Ed. As the preamble mentions, there are actually 12 investigation reports to which MSHA refers in the Benefits section (the 9 you mention, plus three more in which an inadequate examination was not specifically listed as a contributing factor). Also, as the preamble mentions, those reports were in the rulemaking docket at least as early as the date the NPRM was published.

I will see if I can pull them together electronically and e-mail them to you.

Sincerely,  
April

**From:** Green, Edward [mailto:EGreen@crowell.com]

**Sent:** Tuesday, March 15, 2011 3:45 PM

**To:** Nelson, April E - MSHA

**Subject:** MSHA Analysis of 15 fatalities in the PREA for Proposal on Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards

Hello April, I hope all is well with you. I called your office earlier this afternoon to discuss a request I'd like to make in connection with the December 27, 2010 proposed rule on "Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards." 75 Fed. Reg. 81,165. In preparing comments for clients, we have noted that in the Preliminary Regulatory Economic Analysis ("PREA"), contained in the preamble to the proposal itself, the "Benefits" portion of the PREA contains an important discussion of an analysis by MSHA of 15 fatalities. More specifically, the PREA states that out of a total of 91 fatalities reviewed by the Agency, "the investigation reports for 15 of the fatalities specifically listed violations of the preshift, supplemental on-shift, or weekly examinations as contributing factors to the accident." *Id.* 81,169. Furthermore, according to the PREA, "[a]fter analysis of the 15 fatalities, MSHA determined that 9 of them involved violations of mandatory health or safety standards and could have been prevented by a proper examination in accordance with the proposed rule." *Id.*

We think this analysis is a key foundational document for both the PREA and the proposed rule itself. Although we are prepared to send you a formal FOIA letter regarding this analysis, we think that all stakeholders (and the Agency itself) would benefit if MSHA were to take the following two actions:

- make public the analysis and the 9 fatality investigation reports by placing these documents in the rulemaking docket for this proposed rule as quickly as possible; and
- extend the comment period from the current deadline of March 28 to a period ending 15 days after the 9 fatality reports and the MSHA analysis thereof are placed in the rulemaking docket.

In short, we believe that our clients and other stakeholders must be afforded an opportunity to review and comment on the aforementioned MSHA analysis and the 9 underlying fatality reports; and that the opportunity for review and

comment will lead to more effective public input to this important rulemaking. A prompt decision regarding this request will be appreciated.

With regards,

**Ed**

Edward M. Green  
Crowell & Moring LLP  
1001 Pennsylvania Ave., NW  
Washington, DC 20004-2595  
(202) 624-2822 - Direct  
(202) 628-5116 - Fax  
(202) 236-3358 - Cell Phone  
egreen@crowell.com



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**From:** Green, Edward [mailto:EGreen@crowell.com]

**Sent:** Monday, August 01, 2011 3:42 PM

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

**Subject:** RIN 1219-AB75: Supplemental Comments of Murray Energy Corporation on MSHA's Proposed Rule on Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards--

**Importance:** High

2011 AUG -1 P 5:15

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 Murray Energy Corporation on RIN 1219-AB75: MSHA's Proposed Rule on Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards. Thank you for the opportunity to comment on the proposal.

Sincerely,

Edward M. Green.  
Crowell & Moring LLP  
1001 Pennsylvania Ave., NW  
Washington, DC 20004-2595  
(202) 624-2922 - Direct  
(202) 628-5116 - Fax  
(202) 236-3358 - Cell Phone  
egreen@crowell.com

AB75-COMM-28



August 1, 2011

Ms. Roslyn B. Fontaine, Chief  
Acting Director  
Office of Standards, Regulations, and Variances  
Mine Safety and Health Administration  
U.S. Department of Labor  
1100 Wilson Boulevard, Room 2350  
Arlington, VA 22209-3939

**Re: Supplemental Comments of Murray Energy Corporation on MSHA's  
Proposed Rule on Examinations of Work Areas in Underground Coal Mines  
for Violations of Mandatory Health or Safety Standards: RIN 1219-AB75**

Dear Ms. Fontaine:

**Introduction**

Pursuant to the notice published in the Federal Register for June 20, 2011 (76 Fed. Reg. 35,801), announcing additional public hearings and an August 1, 2011 deadline for the filing of post-hearing comments, set forth herein are the comments of Murray Energy Corporation ("MEC") supplementing MEC's initial comments of March 28, 2011 (AB75-COMM-16) on MSHA's Proposed Rule on Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards (the "NPR"), published in the Federal Register for December 27, 2010 (75 Fed. Reg. 81,165). Our post-hearing comments focus on the following three topics:

- Our Freedom of Information ("FOIA") letter of March 17, 2011 and MSHA's reply of April 28, 2011;
- Our concerns about the damaging effect of the NPR on the mine examiner certification programs of the coal mining states; and
- Our additional suggestion to MSHA as to why violations of mandatory standards recorded in examination books and corrected in a reasonable time should not be cited or penalized under the provisions of §§ 104 and 110 of the Federal Mine Safety and Health Act of 1977, as amended.

**Our March 17, 2011 FOIA Letter and MSHA's April 28, 2011 Reply**

In our initial comments of March 28, noted above, we stated that the analysis of the benefits of the proposed rule, as required by Executive Order 12,866, "Regulatory Planning and Review," was extremely poorly reasoned. Without repeating our initial comments,<sup>1</sup> in brief, our view was based upon our vehement disagreement with MSHA's purported "analysis" of 15 fatalities that, according to the Agency, specifically listed in the MSHA investigation reports, violations of mine examination standards.<sup>2</sup> In its "analysis," MSHA claimed that nine of the fatalities involved violations of mandatory health or safety standards which could have been prevented by a proper mine examination in accordance with the proposed rule. After several informal but unsuccessful efforts to obtain documentation for these Agency analyses, we filed a FOIA request on March 17, 2011 to obtain them. By the original close of the comment period, however, MSHA had not responded to this letter. Our March 17 FOIA letter and the emails regarding our informal efforts to obtain the documentation of these analyses are attached to our initial comments.

We appreciated receiving an April 28, 2011 letter from your colleague, Lanesia Washington, responding to our March 17 FOIA request and a copy is attached to these supplemental comments. Ms. Washington's reply stated that MSHA personnel "conducted a search for documents responsive to [our] request and were not able to locate any other than the proposed rule and the fatality reports themselves. . . ." That response, we respectfully submit, confirms our view that, without such documentation, there is no support for the Agency's purely conclusory claims that nine of the 15 cited fatalities could have been prevented by this proposed rule. The serious business of protecting miners by carefully performed mine examinations deserves better than such a flimsy analysis of purported benefits.

**Our Concerns about the Damaging Effect of the NPR on the Mine Examiner Certification Programs of the Coal Mining States**

MEC has paid particular attention to the June 15 public hearing held by MSHA at its headquarters in Arlington, Virginia, especially the testimony presented by Greg Conrad, Executive Director of the Interstate Mining Compact Commission. We fully share Mr. Conrad's concerns about the debilitating effect this NPR may have on state mine examiner certification programs. We wish to endorse his testimony and incorporate it into these supplemental comments as though fully set forth.<sup>3</sup> MSHA has long recognized the value of these state programs. Indeed, they are actually provided for in both the Federal Mine Safety and Health Act

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<sup>1</sup> See AB75-COMM-16 at 13-16.

<sup>2</sup> 75 Fed. Reg. 81,169

<sup>3</sup> See Transcript of Proceedings In The Matter of Examination of Work Areas In Underground Coal Mines For Violations Of Mandatory Health or Safety Standards, Arlington, Virginia, June 15, 2011 at 9-15.

of 1977 (the "Mine Act"), as amended, and in the implementing mandatory safety standards in 30 C.F.R. Part 75. Thus, in section 318 of the Mine Act, the word "certified" as applied to any person means a person registered by the State in which the coal mine is located to perform duties prescribed by the Mine Act. Such duties include those of mine examiners, as spelled out in Mine Act §§ 303 (d), (e), and (f). Those statutory requirements are repeated virtually verbatim in sections 75.2, 75.100, and 75.360 through 75.364 of Part 75.

In short, MEC is concerned that this proposed rule, if promulgated in its current form, could lead to the (unintended—we hope) consequence of dismantling state certification programs for mine examiners. That could be a tragic outcome for our underground employees and the Nation's other underground coal miners.

**Our Additional Suggestion as to Why Violations of Mandatory Standards Recorded in Examination Books and Corrected in a Reasonable Time Should Not Be Penalized Under Mine Act §§ 104 and 110**

In our initial comments, we expressed grave concerns that the NPR would cause many more citations to be issued by MSHA inspectors for no useful safety and health purposes, with the consequence of increasing the already staggering (and growing) backlog of cases before the Federal Mine Safety and Health Commission.<sup>4</sup> We also commented on our concerns about Constitutional due process and self incrimination infirmities.<sup>5</sup> At the very least we urged MSHA to modify the proposed rule language to state that "violations that are recorded in the examination books and which are corrected within a reasonable time will not be cited or penalized as violations for purposes of Mine Act §§ 104 ad 110."<sup>6</sup>

As an additional suggestion in support of this modification, we wish to refer MSHA to a discussion of OSHA voluntary self audits in the 2010 House of Representatives Education and Labor Committee Report of H.R. 5663, The Robert C. Byrd Miner Safety and Health Act Of 2010. While mine examinations are not voluntary and we well understand the differences between the Mine Act and OSHA's enabling statute, we believe the following idea is very suitable as support for our suggested modification above. Thus, the Committee Report stated ". . . where a voluntary self audit identifies a hazardous condition and the employer has corrected the violative condition prior to the initiation of any inspection and taken steps to prevent the recurrence of the condition, the Agency will refrain from issuing a citation. *To encourage voluntary self audits and prompt corrective actions, the Secretary is urged to develop a similar policy with regards [sic] to the Mine Act.*" (Emphasis added.)<sup>7</sup> We were adamantly opposed to

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<sup>4</sup> See AB75-COMM-16 at 11 and 12.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 12.

<sup>7</sup> H.R. Rep. No. 111-579, at 92 (2010).

Ms. Roslyn B. Fontaine  
August 1, 2011  
Page 4

the Byrd Bill in 2010 and remain in such opposition to the 2011 version of the bill. We also are adamantly of the view that this NPR should be withdrawn entirely. Nevertheless, should MSHA decide to proceed with a final rule, we urge the application of this Report language to any such rule.

We appreciate the additional opportunity to comment on the NPR and hope you find these supplemental comments to be useful.

Sincerely,



Edward M. Green  
Counsel for Murray Energy Corporation

Attachment

DCACTIVE-15802022.1

U.S. Department of Labor

Mine Safety and Health Administration  
1100 Wilson Boulevard  
Arlington, Virginia 22209-3939



APR 28 2011

Mr. Edward M. Green  
Crowell and Moring  
1001 Pennsylvania Ave., NW.  
Washington, DC 20004

Re: Freedom of Information Act Request - Tracking No. 640388

Dear Mr. Green:

This letter is in response to your March 17, 2011, Freedom of Information Act request seeking a copy of the "... 'analysis of the 15 fatalities' specified at Page 81169 of the *Federal Register* publication of the proposed rule [Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards, 75 *Fed. Reg.* 81165, 81168] and all MSHA documents prepared in development of this analysis."

We conducted a search for documents responsive to your request and were not able to locate any other than the proposed rule and the fatality reports themselves, which we understand you have already.

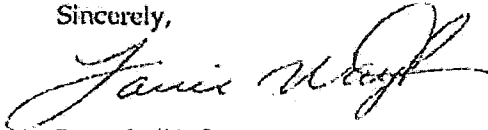
I believe that we have been responsive to your request. Should you disagree, you may file an appeal to the Solicitor of Labor within 90 days from the date you receive this letter. The appeal must state, in writing, the grounds for the appeal, including any supporting statement or arguments. To facilitate processing of the appeal, the appeal should include the appellant's mailing address and daytime telephone number, as well as copies of the initial request and the Disclosure Officer's response. The envelope and the letter of the appeal should be clearly marked "Freedom of Information Act Appeal." Any amendment of the appeal must be in writing and received prior to a decision on the appeal. The appeal should be addressed to:

Solicitor of Labor  
U.S. Department of Labor  
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Sincerely,

A handwritten signature in cursive script, appearing to read "Lanesia Washington".

**Lanesia Washington**  
**MSHA Freedom of Information Act Officer**  
**Office of Standards, Regulations and Variances**

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**From:** Greg Conrad [mailto:gconrad@imcc.isa.us]  
**Sent:** Thursday, July 28, 2011 3:38 PM  
**To:** zzMSHA-Standards - Comments to Fed Reg Group  
**Subject:** RIN 1219-AB75

2011 JUL 28 P 4:49

Attached please find a copy of comments by the Interstate Mining Compact Commission regarding MSHA's proposed rule on Examinations of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards published on December 27, 2010 at 75 Fed Reg 81165. A hard copy of the comments has been faxed to MSHA and also placed in U.S. Mail. Should you have any questions or require additional information, please do not hesitate to contact me.

**Gregory E. Conrad**  
**Executive Director**  
**Interstate Mining Compact Commission**  
**445A Carlisle Drive**  
**Herndon, VA 20170**  
**Ph: 703.709.8654**  
**Fax: 703.709.8655**  
**Email: [gconrad@imcc.isa.us](mailto:gconrad@imcc.isa.us)**  
**Website: [www.imcc.isa.us](http://www.imcc.isa.us)**



AB75-COMM-25



July 28, 2011

Roslyn B. Fontaine  
Acting Director  
Office of Standards, Regulations and Variances  
Mine Safety and Health Administration  
1100 Wilson Boulevard, Room 2350  
Arlington, VA 22209-3939

Re: Docket No. RIN 1219-AB75

Dear Ms Fontaine:

This letter is submitted on behalf of the Interstate Mining Compact Commission (IMCC) concerning a proposed rule regarding Examinations of Work Areas in Underground Coal Mines published by the Mine Safety and Health Administration (MSHA) on December 27, 2010 at 75 Federal Register 81165. The comment period on the proposed rule was recently extended until June 30 via notice at 76 Federal Register 25277. IMCC is a multi-state governmental organization representing the natural resource, environmental protection and mine safety and health interests of its 24 member states. Many of IMCC's member states either operate their own mine safety and health regulatory programs or carry out training and certification responsibilities pursuant to the federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006.

In this proposed rule, MSHA proposes to revise its requirements for pre-shift, supplemental, on-shift, and weekly examinations at underground coal mines by requiring operators to identify violations of mandatory health or safety standards in addition to the existing requirement to identify conditions that pose a hazard to miners. The proposal would also require that the mine operator record and correct violations and review with mine examiners on a quarterly basis all citations and orders issued in areas where these examinations are required. MSHA's stated purpose for the proposed rule is to assure that underground coal mine operators find and fix violations of mandatory health or safety standards and record corrective actions, thereby improving health and safety for miners.

State mine safety and health agencies share many of the goals and objectives articulated in MSHA's proposal, particularly improving health and safety for miners. Several of our member states operate robust mine safety

and health programs that have as part of those programs requirements for the certification of mine personnel, including those who examine underground coal mines. As such, we have a vested interest in the purpose and potential implementation of MSHA's proposed rule for mine examinations.

Our overarching concern with respect to any proposal addressing certification programs is the impacts that it could have on the existing role of state governments pursuant to their respective regulatory programs. Numerous states have comprehensive mine safety and health programs that address, among other things, inspection of mining operations, enforcement of state mining laws, and certification and training of mine personnel. Many of these state programs pre-date federal mine safety laws and in some cases are more stringent than their federal counterpart.

In the area of certification of various competencies that attend the operation of coal mines, the states have always taken the lead pursuant to their own programs and as anticipated and authorized by sections 318, 502 and 503 of the Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006. And while there are differences among the states in how they address certification, recertification, decertification and reciprocity, this aspect of the overall mine safety and health statutory and regulatory scheme has consistently worked well. We are not aware of any instances in the past where the states' implementation of their certification programs has been criticized for ineffectiveness or inadequacy.

MSHA indicates in the preamble to the proposed rule (on page 81167) that it "does not intend that the proposal would significantly change the general scope of examinations under the existing standards." However, we believe that the proposed changes would have exactly that effect with respect to the nature of the examinations, the length of time required for the examinations, and the consequences for mine examiners (and potentially state agencies who certify examiners) when violations of mandatory health or safety standards are missed.

For instance, MSHA states that one of the intended results of the proposed requirements is that conditions which might have been identified only by MSHA inspectors would now be found and corrected by coal operators (via mine examinations). While we agree that there is value in motivating mine operators to be more proactive in creating a culture of safety at coal mines, MSHA's approach fails to recognize the competencies and training required of mine examiners under current state laws and regulatory programs. Mine examiners do not receive the level of training anticipated by this rule, which would essentially convert them into shadow inspectors.

In order for MSHA to accomplish its intended purpose under the proposal, state certification programs would have to be significantly restructured and both current and new examiners would have to undergo enhanced training and testing to insure that they can meet the new standard of identifying all violations of mandatory health or safety standards. The attendant time periods associated with each of the impacted examinations (pre-shift, on-

shift, weekly and supplemental) would also need to be adjusted to allow enough time for examiners to undertake the expanded responsibilities associated with the rule. MSHA's "benefits" analysis pursuant to Executive Order 12866 estimates that the additional amount of time that will be required under various examinations to identify violations of mandatory health or safety standards would be 30 minutes for pre-shift examinations and 15 minutes for on-shift, supplemental and weekly examinations. We are uncertain what "data and experience" MSHA relied upon for these calculations, but we suspect that they are hugely understated.

Regardless of the time factors involved, the larger concern for the states is the consequences for mine examiners, and by extension the states who certify them, if MSHA moves in this direction. Some states are already seeing mine examiners requesting to be decertified because of concerns associated with heightened expectations related to identifying all violations of mandatory health or safety standards. In some cases, this is a matter of not being adequately trained to identify these violations. In others, it is not having enough time during the course of their examinations to find all violations. And in every case, it is a matter of the examiners' integrity, credibility and potential personal liability being on the line. We expect that these concerns will be heightened if MSHA adopts this rule in final form. MSHA specifically states in the preamble to the rule that it "would require that certified mine examiners conduct more complete and thorough examinations." Such a mandate will require appropriate adjustments to training, certification and examination time periods, routes and follow up. It also leads directly to the concern about personal liability.

There is also the larger question of whether an emphasis on finding all violations of mandatory health and safety standards will result in an examiner being distracted from focusing on critical areas so as to identify conditions that pose *hazards* to miners. On at least two occasions (in 1992 and 1996) MSHA chose not to include a requirement that mine examiners check for violations of mandatory health or safety standards because of the impacts this would have on the examiner's primary duty of identifying hazardous conditions. As MSHA once again contemplates moving in the direction of requiring examiners to identify all violations of mandatory health and safety standards, the agency must not only address the impact on hazard identification, but also the concerns raised above regarding training and certification requirements, liability concerns, and the willingness of miners to serve as examiners under the circumstances. If these rules become too onerous, they could become a huge disincentive for persons to serve as examiners, thereby placing the health and safety of miners at risk. It may have been these very considerations that caused MSHA to abandon this approach in past years.

MSHA should also take into consideration the impacts that this rule could have on state certification programs, both in terms of costs and continued viability of the programs. Should MSHA expand the duties of mine examiners as proposed, it will be incumbent on those states who certify these examiners to insure that they can meet and accomplish these new requirements in an effective manner. To do anything less than this could subject the state to potential liability for inadequate certifications. State budgets are already strapped in terms of costs associated with training and certification programs. Thus, depending on the

nature and extent of the enhancements that states must undertake to meet these new requirements, additional support in the way of training grants from MSHA may be required.

In this regard, we disagree with MSHA's finding pursuant to Executive Order 13132 that the proposed rule does not have "federalism implications" for the states because it will not have substantial direct effects on the states. We believe the rule will have distinct and real implications for the states in the way of costs associated with training and certification, some of which could be substantial. We request an opportunity to pursue this aspect of the rule further with MSHA so that we can assure ourselves that adequate resources will be available to meet any new mandates. Otherwise, we may find ourselves in the position of having our certification programs challenged for being ineffective or incomplete. Such a result would be inappropriate and untenable under the circumstances. Again, the states have consistently operated first-rate certification programs and we do not want to see those programs jeopardized by an overlay of new requirements that cannot be addressed without adequate resources.

Finally, the states want to make it clear that we are committed to high quality performance by all mine examiners within our borders. Where blatant poor performance through missed, incomplete or inadequate examinations is an issue, the states are prepared to take action through their respective program requirements. Investigations of these types of occurrences are routinely initiated and where poor performance or negligence is established, the state will immediately de-certify the examiner or suspend the certification. We believe that in the final analysis, this state review and decertification process is where the biggest difference can be made in terms of complete and adequate examinations, quality examiners and protection of miners. Whatever the eventual requirements are for mine examinations, the key to success is an effective certification program at the state level, and we remain committed to the integrity and effectiveness of those programs.

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We appreciate the opportunity to submit these comments. Should you have any questions or require additional information, please do not hesitate to contact us.

Sincerely,

Gregory E. Conrad  
Executive Director

EDWIN P. BRADY  
RESUME

**EDUCATION:**

West Virginia University, Bachelor of Science – Mining Engineering  
Marshall University, Master of Science – Safety

**CERTIFICATIONS:**

West Virginia Coal Miners Certification  
MSHA Instructor Certification  
OSHA Certified General Industry Safety and Health  
OSHA Certified Construction Safety and Health  
Member National Mine Rescue Association  
Professional Member International Society Mine Safety Professionals  
Certificate of Honor – Mine Rescue  
Special Achievement Awards Department Of Labor – 1979, 1982, and 1992  
Secretary of Labor's Exceptional Achievement Award - 2002

**EXPERIENCE:**

2007 to Present: Murray Energy Corporation  
29325 Chagrin Boulevard, Suite 300  
Pepper Pike, Ohio 44122

Manager of Safety and Regulatory Affairs

Brief Overview:

Murray is the largest privately own company in America producing approximately 30 million annual tons of bituminous coal that provides affordable energy to households and businesses across the country. We have eight (8) underground and surface mining operations, plus 40 subsidiary and support companies. Transporting coal via truck, rail and waterways, we operate the second largest fleet of longwall mining units in the country. With a support team of 3,000+ hard-working, dedicated, and talented employees in six (6) states, Murray Energy Corporation provides efficient, safe, and affordable high-quality coal to the country's leading electric producers, domestically and abroad.

Duties:

As a member of the Corporate Safety Department, my duties involve the development, coordination, and conducting of training activities designed to improve individual and group skills for safer and efficient mining activities. I

provide technical advice pertaining to regulatory activities and will often assist operations in negotiating with Federal and State agencies. I will also assist in litigation and appeal processes.

2003 to 2007: U.S. Department of Labor  
 Mine Safety and Health Administration  
 Education Policy and Development  
 National Mine Health and Safety Academy  
 1301 Airport Road  
 Beaver, WV 25813

Manager of National Mine Academy Operations

Brief Overview:

The Academy was established to provide an academic background in mine health and safety to persons assigned to inspect mines, and to design, develop, and conduct educational and instructional programs in support of the Mine Safety and Health Administration's Congressionally-imposed mandate to reduce accidents and health hazards in the mineral industries. The Academy enrollment is comprised of both resident and nonresident students coming from Federal and State agencies, universities, and the mining industry from both the United States and foreign countries.

Duties:

I provided leadership and exercised overall planning and management control, direction, and coordination of resources, activities, programs, and facilities of the Academy, including the development, establishment, and dissemination of policies and procedures; the planning, development and implementation of education and training programs; and the operation of the Academy's physical facilities. I determine program goals and exercise decision making authority within the parameters of MSHA policy and program objectives.

1998 to 2003: U.S. Department of Labor  
 Mine Safety and Health Administration  
 District 4  
 100 Bluestone Road  
 Mount Hope, WV 25880

District Manager

Duties:

I directed the entire enforcement program in Coal District 4 (approximately 180 employees) in accordance with The Federal Coal Mine Health and Safety Act of 1969, as

amended by the Federal Mine Safety and Health Act of 1977. This district consisted of the immediate office of the District Manager, Office of Engineering Services, two inspection divisions, and seven field offices located in southern West Virginia. I was also responsible for a National Lab that conducted analysis work of coal mine gases and coal dust combustibility. As a principal line officer in Coal Mine Safety and Health, I had administrative and technical responsibility and authority for all of the District's work in mine safety and health enforcement issues.

1989 – 1998:           U.S. Department of Labor  
                               Mine Safety and Health Administration  
                               District 3  
                               5012 Mountaineer Mall  
                               Morgantown, WV 26505

Assistant District Manager for Technical Programs

Duties:

I managed and directed the activities of the: ventilation, roof-control, education and training, health, electrical, special enforcement, impoundments and waste banks, and conference and litigation office work groups.

In order to carry out the duties of this position, I was required to have extensive knowledge and exposure to all types of mining systems. The mines that fell under my responsibility varied from 24-inch to 15-foot seam thickness, and employed a variety of mining systems. Many of the mines liberate high quantities of methane, requiring a complex ventilation system. There was also a wide range of geological conditions requiring various roof control measures. In dealing with the various plans and permits, I was required to be knowledgeable in the engineering requirements, regulatory requirements, and current technology. When an impasse was reached in the plan approval process, or technical issue, I acted as chief spokesman for the Agency in dealing with the operator, other inspection agencies, trial litigation or with the workers' representatives.

I served as Acting District Manager during the absence of the District Manager, and served continuously in this capacity from October to December 1991. Served as Acting District Manager for District 10, Madisonville, Kentucky from March to June 1992.

Assisted field office and sub district offices by reviewing and commenting on draft policies/regulations and established District-wide programs. Provided advice to subdistrict managers and enforcement personnel on plan approval process, enforcement action, interpretation of regulation, and unique circumstances.

I served as Chairman of a rewrite committee on firefighting and evacuation procedures and chairman of the rewrite committee pertaining to respirable dust.

I represented MSHA and the U.S. Government on trip to Russia to aid the Russian coal mining industry in areas of free market economy and coal mine safety and health. I made in-mine visits in Siberia and offered ways to improve mine efficiency and health and safety.

1985 – 1989: U.S. Department of Labor  
 Mine Safety and Health Administration  
 District 3  
 5012 Mountaineer Mall  
 Morgantown, WV 26505

Staff Assistant to the District Manager

Duties:

Developed, recommended, and participated with the District Manager in determining planning goals and specific plan objectives. Coordinated the implementation of a Repeat Violation Reduction Program (RVRP). Worked closely with Subdistrict Managers, Chief, Office of Engineering Services, supervisors, specialists, and inspectors in analyzing citations and orders issued, their validity, reason for occurrence and proposed solutions. Trained and explained the program to industry, state officials, MSHA officials, and inspectors.

Represented the District Manager in court involving third-party litigation cases and in Administrative Law Judge hearings, Responded to Congressional inquiries of inspection activities. Coordinated responses to Freedom Of Information Act requests. Coordinated training for the district on new regulations.

Served as a member of MSHA's mine rescue team and participated in rescue/recovery operations at the Wilburg Mine Disaster and Greenwich Collieries Explosion. Served on an investigation team for the multiple fatalities explosion at M.S.W Mine, Pottsville, Pennsylvania.

I was part of MSHA's Mine Emergency Response Training and was involved in training District Managers, Subdistrict Managers, and Engineering Coordinators in simulated disasters. Evaluated and offered suggestions to these managers on the procedures of handling problems that occur at mine disasters.

1983 – 1985: U.S. Department of Labor  
 Mine Safety and Health Administration  
 District 3  
 5012 Mountaineer Mall  
 Morgantown, WV 26505



## Supervisory Coal Mine Safety and Health Inspector

### Duties:

Served as Field Office Supervisor for District 3's Clarksburg and Elkins Field Offices. These two field offices had approximately 43 underground mines and 100 surface mines. Directed the inspection work, answered questions and solved problems in technical areas, administrative areas and compliance. Acted for Assistant District Manager and completed training in Labor Management Relations, EEO, Sexual Harassment, Performance Standards and Appraisals, and DOL/NCFLC Contracts. I was a member of the Executive Committee of the Holmes Safety Association and helped establish chapters and council in that area.

1977 – 1983:           U.S. Department of Labor  
 Mine Safety and Health Administration  
 District 3  
 5012 Mountaineer Mall  
 Morgantown, WV 26505

Mining Engineer

### Duties:

As a mining engineer for the roof control section, I reviewed and recommended approval of or disapproval of roof control plans at assigned mines. I have a knowledge of different types of roof supports (mechanical bolts, resin rods, trusses, lateral force bolts, split sets, etc.) and equipment and methods used to install supports. I conducted roof control inspections and investigations at assigned mines. In order to perform this job, I had to have an understanding and working knowledge of interpretations, regulations, policies, and hazards associated with mining systems. I conducted engineering studies and prepared reports and memorandums of findings. I trained and advised operators and other Federal and state inspectors about engineering aspects of roof control measures. I prepared technical reports on investigation and surveys.

My assignments required knowledge of the Federal Mine Safety and Health Act of 1977, Title 30, Code of Federal Regulations, processes, methods, and equipment utilized in coal mining, and knowledge of engineering principles and practices in a full range of engineering duties.

I was one of three District auditors. I co-authored and conducted audits of the health group, Clarksburg Field Office, Fairmont Field Office, Oakland Field Office, Special Enforcement Group, Ventilation Group, and Roof Control Group. The purpose of the

audits was to determine whether the regulations were being enforced and plans were approved according to MSHA policy.

I was team leader of Accident Reduction Teams assigned to the District 3 program for Reduction of Non-Fatal Days Lost (NFDL) accidents at coals mine with high NFDL rates. I was spokesman for the team and provided direct leadership in engineering and/or system analysis. I assisted in and performed inspections, investigations, and technical work. Served as a judge in first-aid and mine rescue meets.

Resolved roof control problems, evaluated mining equipment, cabs and canopies or devices used in lieu of cabs or canopies, participated on teams investigating accidents, instructed inspectors, specialists and other engineers on new technological developments in the area of roof control, and their implications and effect on inspection procedures.

I conducted a survey on longwall shields and the types used in the District. I participated on a committee as a technical expert on mining near water and underground refuse disposal. The committee directed or modified present standards.

I was a member of the District 3 Emergency Mine Rescue Team and participated in recovery work at Eastern Associated, Joanne Mine (underground work on opening seals and fall clean up) and Consol No. 9 Mine (surface communication).

Specific Engineering Studies included:

- 1) Conducting an engineering study on a three-entry system versus a four-entry system at Dobbin and North Branch Mines, Island Creek Coal Company. This study included pillar and roof stability and problems and solutions surrounding battery haulage equipment.
- 2) Participated as a technical expert on mining near water and underground refuse disposal. The committee developed and/or modified present standards.
- 3) Participated on a team to investigate soil conservation Dam #7 over Valley Camp No. 3 Mine as was required by a court order.
- 4) Conducted a study of a squeeze problem at Gobbler's Knob Mine.
- 5) Conducted audits at the Morgantown Field Office and of the Electrical Group.

I was exposed to mines that employ from 5-800 workers, mines that use conventional mining to mines that use longwall systems, mines that liberate zero cubic feet of methane per 24 hours to mines that liberate 20 million cubic feet of methane per 24 miners, and

mines that use conventional roof supports to mines use a combination of bolts with roof trusses.

In addition, I investigated a 101(c) petition in lieu of current regulations on cabs and canopies. I participated as a technical expert on a committee for mining near bodies of water/underground refuse disposal. Conducted a study on barrier pillar designs used in coal mines and conducted a study on how large intersections affect roof control in mines.

In 1979-1980, I was assigned as a mining engineer to the Waste Embankment and Impoundment Group. I performed studies and inspections of coal waste embankments and impoundments. This required knowledge of prudent engineer design techniques, construction procedures, surface construction equipment, Federal Mine Safety and Health Act of 1977, current policies and existing construction plans.

In this capacity, I reviewed engineering plans submitted by the operator and many times through private engineering consultants. This review process included checking the hydraulic, slope, stabilities by the use of a computer and computer programming and engineering design parameters. Many contacts were made with private consultants on engineering problems encountered during the review. I also inspected shaft and slope sinking sites and reviewed shaft and slope sinking plans. Part of the review included checks on wire rope selection, blasting and hoisting capabilities.

I was a certified trainer in coal waste embankments and impoundments. I provided training to underground and surface inspectors and coal industry personnel on coal waste embankments and impoundments and administered examinations for qualification.

I appeared as a witness in a court hearing on a closure order issued by MSHA on a Fresh Water Dam located at Four States, West Virginia. I received a Special Achievement Award for preliminary work on the study.

I participated in a project to evaluate "bulkheads" at Consol 95 Mine and conducted an engineering study on the ability of the bulkheads to withstand a projected maximum pressure and the areas of the mine that would be affected if the bulkhead were to fail.

In 1978-1979, as a mining engineer, I evaluated ground control plans for surface mines; wrote reports and assembled engineering data. I assisted in an investigation and evaluation of a pond failure at Hodgesville, West Virginia. I worked on fire extinguisher plans for refuse piles and conducted a "key instructors' program" in impoundment inspection. During this assignment, I also co-authored District guidelines for training in "Safe Use and Handling of Explosives."



**Internal Review of MSHA's  
Actions at the Upper Big Branch Mine-South  
Performance Coal Company  
Montcoal, Raleigh County, West Virginia**



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U.S. Department of Labor  
Mine Safety and Health Administration  
Program Evaluation and Information Resources

March 6, 2012

and anemometers) to determine compliance with the standard. During these visits, the highest amount of methane detected was 0.10% and the velocity of air across the longwall face was in compliance with the approved ventilation plan.

During interviews, ten inspectors and one inspector trainee who participated in inspections of UBB during the review period were specifically questioned about their understanding of the application of 30 CFR 75.321(a)(1). Inspectors demonstrated a working knowledge for practical application of this standard. The inspectors did not recall receiving any post-entry level training related to 30 CFR 75.321(a)(1).

Inspectors at UBB demonstrated they recognized violations involving excessive methane levels. On two separate occasions inspectors identified excessive methane levels on a continuous mining machine section and took enforcement action under standards other than 30 CFR 75.321(a)(1).

**Conclusion:** District 4 inspectors did not have the opportunity to identify this contributory violation as their last presence on the UBB longwall was March 23, 2010. Additionally, the Internal Review team determined the inspectors possessed an adequate working knowledge of 30 CFR 75.321(a)(1). Past inspection activity demonstrated that they would have taken appropriate enforcement action if they had encountered a violation of this standard.

**Recommendations:** None

### **Enforcement of 30 CFR 75.360, 75.362, 75.363, and 75.364**

*Hazardous conditions; posting, correcting, and recording; preshift, on-shift, and weekly examinations*

**Requirements:** Preshift examinations are required to be made by a certified person in all underground coal mines as specified in 30 CFR 75.360. In addition to making the examinations, certified persons must certify that the examinations have been conducted and record the examination results, including hazardous conditions found, results and locations of air and methane measurements, and actions taken to correct hazardous conditions. Mandatory safety standard 30 CFR 75.360(a)(1) stated, in pertinent part:

Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. ~~No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval.~~

Mandatory safety standards 30 CFR 75.360(a)(2) through 75.360(g) specified locations where the preshift examinations must be conducted, for what the operator must examine, and how the operator is to certify and record such examinations.

Mandatory safety standard 30 CFR 75.362 and its subparagraphs required a certified person designated by the operator to conduct at least once during each shift an on-shift examination of each working section to check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction. A person designated by the operator must also conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan. Tests for methane are required to be made at 20-minute intervals, or more often if required in the approved ventilation plan, at specific locations during the operation of equipment in the working place. When a longwall mining system is used, these methane tests shall be made at the shearer.

Mandatory safety standard 30 CFR 75.363(a) required hazardous conditions found by certified mine examiners designated by the mine operator to be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the condition is corrected.

Mandatory safety standard 30 CFR 75.363(b) required that a record be made by the completion of the shift on which the hazardous condition was found. The record shall include the nature and location of the

entire review period, although procedures state inspectors should observe the equipment used by all examiners with whom they travel. The handheld gas detectors being used on the longwall face at UBB were not among those checked by inspectors during the review period. However, inspection procedures did not specify that these detectors be checked.

**Conclusion:** During the review period, District 4 inspectors indicated in their notes that accumulations of combustible materials should have been observed by on-shift examiners. However, the inspectors did not recognize this constituted a violation of 30 CFR 75.362(a)(1) for failing to conduct an adequate examination. Inexperienced and acting supervisors did not provide adequate oversight after reviewing inspectors' work products.

District 4 inspectors did not follow Agency procedures for assessing the quality of on-shift examinations at UBB. District 4 inspectors did not consistently determine whether on-shift examinations of the dust control parameters on the longwall were conducted. Inspectors did not travel with an on-shift examiner during the first regular inspection conducted at UBB for fiscal 2010.

During respirable dust surveys on the longwall, inspectors checked the water pressure and number of sprays. The missing water sprays and low water pressure cited by the Accident Investigation team were not observed by inspectors and were not recorded by the Operator in the on-shift examination record books. Therefore, inspectors were never aware of the Operator's practice of mining with sprays removed from the shearer drum.

District 4 inspectors did not have an opportunity to observe the handheld gas detector used on the longwall face that was turned off on April 5. During the review period, all handheld gas detectors in use at UBB observed by inspectors were turned on.

#### Enforcement of 30 CFR 75.363

**Statement of Facts:** The MSHA Accident Investigation team determined the Operator failed to immediately correct or post with conspicuous "Danger" signs hazardous conditions observed and recorded during the on-shift examinations of the belt conveyor systems in the north area of the Mine. From March 1, 2010, through April 5, 2010, the Operator's on-shift examination records identified approximately 982 hazardous conditions, of which approximately 937 were listed as accumulations of coal and/or lack of rock dusting. The preshift and on-shift records do not indicate that corrective actions were taken to correct most of these conditions.

The Accident Investigation team determined that this violation contributed to the severity of the explosion and issued a section 104(d)(2) order (No. 4900578) for Performance Coal Company's unwarrantable failure to comply with 30 CFR 75.363(a). Additionally, the MSHA Accident Investigation team determined that certified examiner William Campbell, an employee of David Stanley Consultants, LLC, an independent contractor (Contractor) hired by Performance Coal Company, failed to immediately correct or post with a conspicuous danger sign hazardous conditions he observed and recorded during on-shift examinations of the belt conveyor systems. A section 104(a) citation (No. 4900615) was issued to the Contractor for failure to comply with 30 CFR 75.363(a).

The Internal Review team compared UBB's on-shift belt examination record books and MSHA inspection reports to determine how District 4 personnel addressed hazardous conditions identified and recorded by UBB certified examiners. In particular, the review was concerned with the enforcement of 30 CFR 75.363. During the review period, two violations at UBB were cited under this standard. During the same period, the number of citations and orders issued for violations of 30 CFR 75.363 throughout District 4 was as follows:

- 75.363(a) – 10 issued, one as a section 104(d)(2) Order
- 75.363(b) – 14 issued, one as a section 104(d)(2) Order
- 75.363(c) – 11 issued, one as a section 104(d)(1) Order

Information obtained during interviews of District 4 inspectors assigned to UBB during the review period and supervisors from the Mt. Hope Field Office confirm they were aware that failure to correct hazards

Enforcement of 30 CFR 75.364

**Statement of Facts:** The MSHA Accident Investigation team determined that Performance Coal Company engaged in a practice of failing to conduct adequate weekly examinations in the north area of the Mine from January 1, 2010, until the time of the explosion. Weekly examinations conducted during this period failed to identify and correct obvious hazardous conditions, including accumulations of combustible materials, and failed to effectively evaluate the performance of the Mine ventilation system. The cited practice includes violations of six subparagraphs of 30 CFR 75.364.

The Accident Investigation team determined that this violation contributed to the explosion, and issued a section 104(d)(2) order (No. 8431855) for the Operator's unwarrantable failure to comply with the requirements of 30 CFR 75.364. The Accident Investigation team determined that the Operator engaged in aggravated conduct constituting more than ordinary negligence.

The practices cited by the Accident Investigation team include the following:

- 30 CFR 75.364(a) - The Operator did not examine specific evaluation points and worked out areas every seven days. Examination records indicate the mine operator did not make measurements of the air quality and/or quantity at seven evaluation and measuring points around the longwall. One examiner conducted weekly examinations in the affected area with his multi-gas detector turned off from March 18 to the date of the explosion.
- 30 CFR 75.364(b) - The Operator did not examine one return and three intake air courses for hazards every seven days.
- 30 CFR 75.364(c) - The Operator did not determine air quality and quantity for 13 intake air splits and five return air splits.
- 30 CFR 75.364(d) - The Operator did not immediately correct obvious hazardous conditions in ten air courses and two bleeders and did not list corrective actions in weekly examination records. The hazardous conditions included loose coal, coal dust, float coal dust, and excessive entry widths.
- 30 CFR 75.364(f) - From March 16, 2010, until the time of the explosion, the Operator allowed miners to enter the Mine although the Mine had not been examined in its entirety. The Operator's examination record book indicated that EP-LWI was blocked by water and could not be examined.
- 30 CFR 75.364(h) - On various dates from January 1, 2010, until the time of the explosion and for various locations, the Operator did not record results of weekly examinations and corrective actions in the examination record books.

During the review period, District 4 inspectors and specialists issued 13 section 104(a) citations and five section 104(d)(2) orders for violations of 30 CFR 75.364 and its subparagraphs at UBB. Ten violations were related to conditions that prevented examination of air courses. Four were for failing to conduct weekly examinations; two were for failing to record examinations; and two were for failing to post dates, times, and initials underground during examinations. Inspectors did not cite any violations of 30 CFR 75.364(h) for the Operator's failure to record corrective actions in the weekly examination record books.

During the second regular inspection for fiscal 2010, District 4 personnel documented examining the Operator's weekly examination record books at least 14 times from January 11 to March 16. The inspector who examined the weekly record books on March 16 documented in the ITS that he examined the books to comply with instructions in the *General Coal Mine Inspection Procedures and Inspection Tracking System Handbook*. None of the inspectors identified the violations of 30 CFR 75.364 indicated in the Operator's weekly examination records that were cited by the Accident Investigation team in the section 104(d)(2) order issued to the Operator.

In their interviews, Mt. Hope Field Office inspectors stated that they generally understood most requirements of 30 CFR 75.364 and related inspection procedures. They demonstrated that they were



enforcement actions, or how to evaluate the information to determine if mines are being adequately ventilated and fully examined.

Inspectors did not comply with the procedural requirement to travel with at least one weekly examiner during the fourth regular inspection for fiscal 2009. Inspectors did, however, document they traveled with weekly examiners during the last regular inspection completed prior to the explosion as required. While inspectors stated they inspected and observed the use and operation of handheld gas detectors, they did not document examining gas detectors during the last regular inspection prior to the explosion. However, there was no indication that enforcement personnel had an opportunity to inspect the detector carried by the examiner identified in the contributory section 104(d) order issued by the Accident Investigation team to the Operator.

**Corrective Actions Taken:** The Administrator for Coal held all-employee meetings with District 4 and 12 personnel stressing the importance of conforming to inspection procedures for determining operator compliance with examination standards, including checking examination records for required air measurements.

On December 27, 2010, MSHA published a proposed rule on "Examination of Work Areas in Underground Coal Mines for Violations of Mandatory Health or Safety Standards" that would require operators to conduct examinations for violations of mandatory health or safety standards, in addition to hazardous conditions. The proposed rule also would require operators to record violations of mandatory health or safety standards and their locations found by examiners, as well as actions taken to correct them. Notice of the Final Rule was published as part of MSHA's Fall Regulatory Agenda in January 2012. The rule is expected to be finalized in March 2012.

**Recommendations:** The Administrator for Coal should collaborate with the Director of EPD to revise the curriculum at the National Mine Health and Safety Academy regarding inspection procedures for evaluating operator compliance with examination standards. The training should explain the purpose and utilization of an inspector's review of mine examination records. This training should be provided to entry-level inspectors, journeyman inspectors, specialists, supervisors, and assistant district managers.

The training should provide instructions on:

- determining whether adequate examinations have been conducted;
- determining whether the operator has recorded in the examination book the specific corrective action taken to eliminate the hazard;
- identifying incomplete records of examinations, including missing air quantities and air quality measurements;
- using examination records to aid in the enforcement of 30 CFR 75.360, 75.362, 75.363, and 75.364;
- traveling with and evaluating at least one preshift examiner, one on-shift examiner, and one weekly examiner during each regular inspection;
- determining whether the operator conducted on-shift examinations of dust control parameters; and
- using examination records in the evaluation of the operator's negligence for violations of other safety and health standards.

The Administrator for Coal should direct the revision of the *General Coal Mine Inspection Procedures and Inspection Tracking System Handbook* to describe the purpose of an inspector's review of the operators' examination records, and how the review should be utilized during inspections. The revised procedures should also identify specific items that should be checked when reviewing mine examination records, such as whether:

- examinations have been conducted at required intervals;
- examination records indicate violations of mandatory safety or health standards;
- hazardous conditions have been properly recorded;
- records of violations or hazardous conditions indicate a need for inspectors to follow up;

The Internal Review team found District 4 improved its performance in many areas following the January 2006 Aracoma fire. For example, the Aracoma review report identified many deficiencies associated with section 103(i) inspections at Aracoma. However, District 4 correctly conducted all 46 required section 103(i) inspections at UBB during the review period. Additionally, the District did not identify any section 104(d) violations at Aracoma between June 20, 2001, and January 19, 2006, the date of the fatal fire. In contrast, the District identified more section 104(d) violations at UBB during fiscal 2009 than at any other mine in the nation.

Table 22 identifies significant deficiencies common to the five previous review reports. As shown in the table, the Internal Review team identified three deficiencies common to all five of the previous review reports.<sup>72</sup> These were:

- Incomplete or Inadequate Inspections and Documentation
- Inadequate Supervisory/Managerial Oversight
- Failure to Identify Mine Operators' Deviations from their Approved Mining Plans

**Table 22 - Issues at UBB Common with Prior Internal Reviews**

Issue	Jim Walter Resources	Sago	Aracoma	Darby	Crandall Canyon
Incomplete or Inadequate Inspections and Documentation	X	X	X	X	X
Rock Dust Sampling	X	X		X	
Inspection of AMS/Carbon Monoxide System			X		
Travel with Mine Examiners		X			
Effective Use of Enforcement Tools	X	X	X	X	
Inadequate Supervisory/Managerial Oversight	X	X	X	X	X
Mine Rescue and Recovery		X		X	X
Inadequate Response to District Level (Peer) Reviews	X	X	X	X	
Examination of Record Books	X	X		X	X
Excessive Abatement Time				X	
Lack of Valid Respirable Dust Surveys					X
Plan Review Issues		X			X
Failure to Identify Mine Operators' Deviations from their Approved Mining Plans	X	X	X	X	X
Inadequate Standards and Directives		X	X	X	

Some deficiencies identified in one or more of the previous review reports were not identified during the internal review following the UBB explosion. Some deficiencies identified in these review reports could be not be compared in a consistent manner. For example, an AMS was not used in each of the five mines, so it was not possible to evaluate the manner in which MSHA inspected the AMS at some of the mines.

In identifying these deficiencies, the Internal Review team is aware that they relate to broad categories of duties, involving complex procedures. Thus, it is not unreasonable to expect that a comprehensive internal review of District 4 inspections at a large underground mine (such as UBB) over an 18-month period would identify some deficiencies in the manner inspections were conducted and documented. Likewise, given the breadth of supervisory and managerial responsibilities, and the number of complex issues addressed in approved mining plans, it is not surprising that the Internal Review team also identified some deficiencies in these areas. Moreover, the identification of a recurring issue does not

<sup>72</sup> Table 22 cannot be used to compare MSHA's performance at the respective mines prior to the accidents. While listing issues identified during the UBB internal review that also had been identified in five preceding review reports, the table does not list issues identified in the preceding review reports that were not found to exist with respect to UBB. Moreover, the table does not quantify the extent of, nor precisely qualify the nature of, the issues at the respective mines.

where they ultimately were identified. However, some violations likely existed during the last MSHA inspection. In some cases, District 4 personnel did not recognize the violations. In other cases, District 4 personnel did not inspect the areas where these violations were ultimately identified.

MSHA headquarters could have been more effective in providing oversight and direction to the districts. MSHA has effectively addressed some deficiencies in performance identified in past accountability and internal reviews. However, headquarters did not follow up to ensure that other deficiencies were corrected. Many of these deficiencies have continued to be identified during subsequent accountability and internal reviews. MSHA program areas also did not properly administer and maintain the established MSHA directives system. In many instances, Coal issued directions for all field staff using memoranda and e-mails, bypassing the directives system. In some cases, this resulted in field staff being directed by unclear, redundant, and conflicting instructions for carrying out their enforcement responsibilities.

Since the explosion, MSHA has implemented several corrective actions to address shortcomings related to the Agency's actions with respect to UBB. These corrective actions are detailed throughout this report. The Internal Review team recommends additional measures that the Agency should implement to further improve its ability to administer the Mine Act. These recommendations generally fall into the following core categories:

- **Set attainable expectations for inspectors.** Clearly define the salient parts of a regular inspection based on the specific provisions of section 103(a) of the Mine Act. Provide inspectors with the tools, training, and oversight needed to increase the effectiveness and efficiency of their inspection activities.
- **Improve direction and guidance to the workforce.** Assign an Agency policy coordinator to ensure the internal consistency, accessibility, and currency of MSHA directives. Use the MSHA directives system and maintain all policy and procedural guidance within that system. Consolidate policies and procedures and eliminate outdated directives to reduce the volume of material enforcement personnel must know and follow. Issue new or revise existing policy and procedures to provide clear and consistent guidance with respect to inspection, plan review, and respirable dust compliance issues identified in this report.
- **Provide additional training for inspectors, supervisors, and managers.** Train inspectors, specialists, and supervisors on inspecting mine examination books and training records, inspecting longwall operations, evaluating bleeder systems, conducting rock dust surveys, taking spot rock dust samples, properly evaluating violations for gravity and negligence, and responding to mine emergencies. Provide comprehensive training and re-training, including training on enforcement policies and procedures and providing effective oversight, to supervisors and managers.
- **Oversee inspection and mine plan review activities more effectively.** Conduct more comprehensive and timely reviews of inspector work products, including inspection notes, inspection tracking maps, ITS, and enforcement actions. Monitor respirable dust and rock dust sampling activities to determine whether they are conducted in accordance with established policies and procedures. Conduct effective Field Activity Reviews, Accompanied Activities, mine visit activities, and 2<sup>nd</sup> level reviews. Monitor the review of mine plans and supplements to determine if they are conducted accurately and within timeframes.
- **Use technology more effectively to enhance the quality of inspections and the application of enforcement tools.** Implement Inspectors' Portable Application for Laptops revisions to allow inspectors to upload air sample collection data directly into the MSHA Standardized Information System for integration with the Mt. Hope laboratory, eliminating several layers of redundant data entry. Develop standard oversight reports to monitor rock dust surveys with no samples collected or surveys containing all "Wet" locations. Deploy an oversight report to ensure that all potentially flagrant violations are reviewed for special assessment. Use automated tools to track abatement times for respirable dust violations.

- Require program area administrators and directors to certify that the corrective actions within their purview have been fully implemented
- Assign responsibility for measuring the outcomes of corrective actions, that is, whether the corrective action(s) addressed the identified shortcoming(s) without adverse unintended consequences
- Make adjustments when audits, evaluations, and other information indicate that corrective actions are failing to achieve the desired outcomes

Given the existing demands on MSHA inspectors and supervisors, the Internal Review team believes that corrective actions must be implemented in a manner that does not increase the burden already placed on MSHA personnel. Indeed, the Internal Review team believes that many of the recommendations, once implemented, will increase the quality of inspections, plan reviews, and supervisory functions while reducing burden by reallocating resources, consolidating directives, and improving the use of technology to increase efficiency.

In order to fulfill its mission effectively, MSHA regularly must reassess the implementation and effect of Agency policies, procedures, and regulations and make adjustments when appropriate. The manner in which MSHA administers the Mine Act must evolve with changes in the mining industry, technology, experience, and technical information to most effectively further the Mine Act's safety and health goals. The critical importance of the Agency's mission – protecting the safety and health of the nation's miners – demands nothing less.

Belt Conveyor Inspected	Date Inspected	Accumulations Reported During Exam	Other Hazards Reported During Exam	Corrective Actions Reported	30 CFR 75.400 Violation Cited	Other Hazards Cited	Failure to Take Corrective Action Cited	Comments
#2 North	2/22/2010	Yes	No	No	No	No	No	Belt reported as needing dusted in places for two shifts prior to inspection. Same conditions continue to be recorded for several shifts after inspection with no corrective actions.
4 Section (Barrier)	2/22/2010	No	No	No	No	No	No	Belt is idle due to section being moved.
1 Section, #1 Belt	3/9/2010	Yes	No	No	Yes	No	No	Exam records show the belt needing cleaned and dusted every shift for entire book, back to 3-1-2010. The inspector issued a section 104(a) citation for the violation of 30 CFR 75.400, with the operator's negligence evaluated as moderate.
1 Section, #1 Belt	3/15/2010	Yes	No	No	Yes	Yes	No	Exam records show the belt needing cleaned and dusted every shift for entire book, back to 3-1-2010. The inspector issued a section 104(a) citation for the violation of 30 CFR 75.400, with the operator's negligence evaluated as moderate.
2 Section, #1 Belt	3/15/2010	Yes	No	No	No	Yes	No	Belt reported as needing cleaned and dusted in places for 3 shifts prior to inspection.
Longwall Belt	3/15/2010	Yes	Yes	No	Yes	Yes	No	Records state "Need spot cleaned & dusted" for 11 shifts prior to inspection. The inspector issued 2 section 104(a) citations for these violations of 30 CFR 75.400, with the operator's negligence evaluated as moderate. A section 104(b) order was issued on 3/24/2010 for failure to abate one of these violations.
#5 North Mains	3/15/2010	Yes	No	No	Yes	No	No	Records consistently report cited condition since book was started on 3/1/2010. The inspector issued a section 104(a) citation for the violation of 30 CFR 75.400, with the operator's negligence evaluated as moderate.



# Preshift Examination

- ← Examine for hazardous conditions
  - ← Loose roof and ribs
  - ← Excessive levels of methane
  - ← Oxygen deficiency
  - ← Damaged, missing or improperly installed ventilation controls on the section
  - ← Accumulations of loose coal or coal dust
  - ← Rock dust not applied in required quantities
  - ← Electrical hazards
  - ← Fire hazards from damaged or improperly operating belt conveyors
- ← Other obvious fire hazards