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August 8, 2008

MSHA  
Office of Standards, Regulations, and Variances  
1100 Wilson Blvd., Room 2350  
Arlington, VA 22209-3939

**Re: RIN 1219-AB58, Refuge Alternatives**

Please accept these comments regarding the above-styled rulemaking for refuge alternatives for underground coal mines. I submit these comments on behalf of the West Virginia Mine Safety Project of the Appalachian Center for the Economy and the Environment. The Appalachian Center is a regional, non-profit law and policy organization. The West Virginia Mine Safety Project offers direct legal assistance to West Virginia coal miners regarding workplace health and safety matters and advocates for protective mine health and safety standards.

As with previous comments to MSHA, we submit these comments mindful of Congress's overarching mandate that MSHA is to undertake its regulatory and enforcement duties with miners' safety and health foremost in mind. After all, "Congress declares that the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a).

Unfortunately, though, MSHA seems to have lost sight of this core responsibility. For example, recent findings in the independent review of MSHA's actions surrounding the Crandall Canyon disaster of August 2007 highlight MSHA's hands-off regulation of the coal industry and the agency's embrace of compliance and training assistance instead.<sup>1</sup> As such, it is difficult to imagine MSHA undertaking this rulemaking for refuge alternatives had Congress not outright required MSHA to do so in the Consolidated Appropriations Act of 2008. Unfortunately, MSHA's dislike of worker-friendly regulation comes from Department of Labor leadership as well as from within MSHA's own leadership, as illustrated by the DOL's recent efforts to rush through a regulation that would water down protections for workers across the board who are exposed to chemicals and toxins in the workplace.<sup>2</sup> It is with skepticism, then, that we evaluate the proposed rule.

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<sup>1</sup> Teaster, Earnest C. Jr. & Pavlovich. Independent Review of MSHA's Actions at Crandall Canyon Mine, Genwal Resources, Incorporated, Huntington, Emery County, Utah. Washington, D.C.: Mine Safety and Health Administration, July 2008.

<sup>2</sup> Leonnig, Carol D. "U.S. Rushes to Change Workplace Toxin Rules." Washington Post 23 July 2008: A01.

The MINER Act of 2006, in Section 13, required only that the National Institute for Occupational Safety and Health (NIOSH) study the options for refuge alternatives; the MINER Act did not require MSHA to promulgate regulations in response to NIOSH's findings in this regard. After passing the MINER Act, Congress then undoubtedly witnessed MSHA's aversion to regulation and responded accordingly with the requirement for refuge alternative rulemaking in the Consolidated Appropriations Act of 2008.

Turning to the particulars of the proposed regulation for refuge alternatives, there are some troubling provisions. The first is at proposed § 75.1507(c), which would permit refuge alternatives comprised of "materials pre-positioned for miners to construct a secure space with an isolated atmosphere." Rather than requiring pre-fabricated self-contained units or shelters constructed in place, MSHA would afford operators the latitude to have only what might amount to a glorified barricading system. The failures of simple barricades – such as the one at the Sago Mine, resulting in the deaths of 11 of the 12 deceased Sago miners – is precisely why Congress has had to force MSHA's hand in better regulating refuge alternatives beyond such paltry options as crude barricades.

In the Consolidated Appropriations Act of 2008, Congress required that MSHA propose regulations requiring rescue chambers that are consistent with NIOSH's recommendations. Congress further directed that facilities other than rescue chambers must afford the same degree of protection as that afforded by rescue chambers.

Despite Congress's directive here, there is little detail in MSHA's proposed rule or the record generally about the "materials pre-positioned" alternative. Certainly, there is nothing in NIOSH's report evaluating or endorsing the "materials pre-positioned" option.<sup>3</sup> Given MSHA's lax track record, then, we can only surmise that it might be a way to allow operators to skirt the expense of full-blown refuge alternatives as Congress envisioned, while giving miners less protection than they would be afforded with either pre-fabricated units or shelters constructed in place. MSHA itself recognizes that:

Properly constructing and activating a refuge alternative can be a relatively complex procedure that must be done correctly to establish a breathable air environment in a smoke-filled mine. . . Failure to correctly perform these tasks may imperil the lives of miners within the refuge alternative.<sup>4</sup>

Obviously, quick construction and activation of a refuge alternative is of the utmost importance. Yet, there is precious little information about how MSHA will assure that such "materials pre-positioned" refuge alternatives will be as protective as the other types of refuge alternatives delineated in the proposed regulation, how they will be deployed quickly and successfully in stressful emergency situations, or how such an alternative is consistent with NIOSH's recommendations. Thus, the "materials pre-positioned" alternative is unacceptable and in contravention of Congress's directive in the Consolidated Appropriations Act. Thus, we urge MSHA to delete it from the final version of this rule.

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<sup>3</sup> National Institute for Occupational Safety and Health. Research Report on Refuge Alternatives for Underground Coal Mines. December 2007.

<sup>4</sup> 73 Fed. Reg. 34140, 34156 (June 16, 2008).

Another troubling provision is MSHA's *carte blanche* grandfathering of refuge alternatives which meet state-level requirements for refuge alternatives. In its section-by-section analysis, MSHA says that "Refuge alternatives that states have approved and those that MSHA has accepted in approved ERPs would meet the requirements of this proposed rule."<sup>5</sup> Furthermore, MSHA says, only after operators replace these refuge alternatives or components that are already in place – upwards of 10 years – will operators be required to fully comply with the proposed federal rule. Thus, states may require refuge alternatives that are inferior to those required in MSHA's rule, and MSHA would decree operators who are in compliance with a state's inferior requirement as being in compliance with MSHA's own regulation. With such grandfathering, MSHA is trying to spare operators the hassle and expense of upgrading their refuge alternatives to provide the best-available safety equipment for miners. This approach also ignores NIOSH's report to MSHA. This report describes problems with rescue chambers approved for use in West Virginia, such as heat dissipation in steel refuges, variations in time to deploy refuges, and problems maintaining acceptable carbon dioxide levels. Nevertheless, under MSHA's proposal, operators would be permitted to provide problematic refuge alternatives and still be in compliance with MSHA's regulation.

To conclude, in key respects, MSHA's proposed regulation is designed to minimize operators' cost and inconvenience rather than maximize miners' safety. MSHA would do well to bear in mind that its charge is not to protect coal operators. Rather, MSHA's charge is to protect coal miners. Accordingly, while a regulation requiring refuge alternatives is long overdue, MSHA must strengthen its proposed regulation to protect miners as Congress intended.

Thank you for your consideration of these comments.

Sincerely,



Nathan Fetty  
Staff Attorney

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<sup>5</sup> *Id.* at 34142.