



**Thomas M. Wynne**  
Vice President - Operations

September 17, 2007

Ms. Patricia W. Silvey  
Director, Office of Standards,  
Regulations and Variances  
Mine Safety and Health Administration  
1100 Wilson Boulevard  
Room 2350  
Arlington, VA 22209-3939

Re: **Comments of Alliance Coal, LLC on MSHA's Emergency  
Temporary Standard for Sealing of Abandoned  
Areas in Underground Coal Mines: RIN 1219-AB52**

Dear Ms. Silvey:

Set forth below are the comments of Alliance Coal, LLC ("Alliance") on the subject emergency temporary standard ("Seals ETS"), published as a final rule in the *Federal Register* for May 22, 2007. 72 Fed. Reg. 28796. Alliance is a diversified coal producer with eight large underground coal mining complexes in Illinois, Indiana, Kentucky, West Virginia, and Maryland. Thus, Alliance's underground coal mines are operating in four MSHA Coal Mine Safety and Health Districts, specifically Districts 3, 6, 8 and 10. Alliance is also a member of the National Mining Association ("NMA"). As such, we hereby adopt the comments of NMA on the Seals ETS, and incorporate them by reference in our comments as though fully set forth.

## **OVERVIEW**

As our starting point in providing MSHA with our comments on the Seals ETS, we wish to reaffirm that Alliance strongly supports the intent of Congress in enacting the Mine Improvement and New Emergency Response Act of 2006 or the "MINER Act" (hereinafter "MINER Act"). Thus, we understand that MINER Act §10 requires MSHA to finalize, by December 15, 2007, mandatory safety standards

relating to the sealing of abandoned areas in underground coal mines which must provide for an increase in the 20 pounds per square inch ("psi") standard in effect at the time of passage of the MINER Act, as then specified at 30 C.F.R. § 75.335(a)(2). In light of this statutory mandate, Alliance does not question the authority of MSHA to develop appropriate and reasonable new seals standards. However, we

think the ETS sweeps with too broad a brush. Not only does it revise 30 C.F.R. § 75.335 to eliminate the alternative 20 psi standard of §75.335(a)(2), but it also rescinds the codified, time-tested and safe use of Mitchell-Barrett seals by deleting § 75.335(a)(1), as it had been in effect for over 15 years. Not only is this not authorized by MINER Act § 10, but also it is wholly inappropriate to throw out this baby with the bath-water.

In addition, as we shall discuss in more detail below, we do not believe that these standards should have been promulgated as an emergency temporary standard ("ETS") pursuant to the extraordinary authority granted to MSHA under §101(b) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act") because we do not agree that the fundamental basis for use of this special rulemaking procedure exists (i.e., exposure of miners to grave danger necessitating an ETS to protect miners from such danger). More specifically, in our underground coal mines alone, we have built thousands of seals over the past four decades, and our experience has been that they do not pose a danger to our miners, let alone a *grave* danger.

Not only do we strongly believe that the Seals ETS fails to meet the threshold for short-cutting normal notice and comment rulemaking (as required by Mine Act §101(a) and the general rulemaking provisions of the Administrative Procedure Act), but we are also terribly concerned that following the Sago and Darby mine explosions, and both before and since publication of the Seals ETS, MSHA's seals policies have been singularly confusing and shifting. Thus, (as we again will discuss more fully below) beginning in the summer of 2006 and up until publication of the Seals ETS on May 22, a *de facto* moratorium existed on the construction of vitally needed new mine seals authorized by § 75.335(a)(2). Indeed, the series of policy pronouncements regarding mine seals issued by MSHA prior to publication of the ETS on May 22, effectively (and illegally) rescinded the then-existing provisions of 30 C.F.R. § 75.335(a)(2).

Furthermore, since publication of the Seals ETS, our efforts and the efforts of other underground coal mine operators to comply with the ETS, and MSHA's administration of the ETS have been enormously complicated and confusing because of a constant stream of interpretations, explanations, and policy pronouncements emanating from MSHA's headquarters. These have led not only to nationwide chaos regarding the ETS, but also to chaotic situations on a District-by-

District, mine-by-mine basis. Each Coal Mine Safety and Health District in which we have operations seems to develop its own interpretations and policies which vary from day-to-day, if not inspector-by-inspector. The result of all this lurching and terribly unsettled situation is that operators are frequently being cited for violations of the Seals ETS (oftentimes with mine-wide implications) based on confusing, contradictory, and arbitrary determinations on the part of MSHA inspection personnel.

Because of this confusing *ad hoc* enforcement of the Seals ETS, Alliance is also very concerned that MSHA's insistence (on too many occasions) that new seals be built in front of existing seals exposes miners to the atmosphere behind the existing seal and results in miners being located in unsafe positions. We submit that such an outcome violates MSHA's statutory obligations, pursuant to Mine Act § 101(a)(9), not "to reduce the protection afforded miners by an existing mandatory . . . safety standard."

When all is said and done, the confusing, chaotic, and inconsistent implementation of the Seals ETS at our mines and around the country is due to the failure of the ETS itself to clearly spell out what is required. For example, the question of what constitutes an acceptable "protocol" and "action plan" as required by §75.335 (b)(5), for purposes of sampling and monitoring seals is unsettled. And most controversial of all is the critically important question of what constitutes the "affected area" specified in §75.335(b)(4)(ii). The effect of these overly vague provisions is to allow unfettered discretion on the part of MSHA enforcement personnel, with all or portions of underground coal mines being shut down for no scientifically sound safety or engineering reasons. Our comments will address each of these problems more fully below.

### **THE SEALS ETS SWEEPS WITH TOO BROAD A BRUSH.**

MINER Act § 10 specifically provides:

Not later than [December 15, 2007], the Secretary of Labor shall finalize mandatory health and safety standards relating to the sealing of abandoned areas in underground coal mines. Such health and safety standards shall provide for an increase in the 20 psi standard currently set forth in section 75.335(a)(2) of Title 30, Code of Federal Regulations.

Thus, it is clear (based on the specific language of MINER Act § 10) that the Congress wanted MSHA to finalize new seals standards *only* in connection with the then-extant requirements of 30 C.F.R. § 75.335(a)(2) setting forth provisions for

alternative methods or materials which could be used to create a seal if they can withstand a static horizontal pressure of 20 pounds, and as approved in the specific mine's ventilation plan. Because Congress only spoke to § 75.335(a)(2), it is incontrovertible that Congress specifically did not intend to disturb the use of the time-tested and safe Mitchell-Barrett seals described in § 75.335(a)(1).

Alliance strongly believes that the appropriate use of Mitchell-Barrett seals is perfectly safe. Our view not only extends to existing seals, but we also believe that the ETS should be revised to allow construction of new Mitchell-Barrett seals in appropriate circumstances. In this regard, we specifically support the paper provided to the Agency by NMA's comments, entitled "Experimental Study of the Effects of LLEM Explosions on Various Seals and Other Structures and Objects."

**THE SEALS ETS DOES NOT DEMONSTRATE EXISTENCE OF "GRAVE DANGER," THE REQUIRED PREREQUISITE FOR INVOCATION OF MSHA'S ETS AUTHORITY**

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As a general proposition, development of mandatory safety and health standards under the Mine Act is carried out by following the general notice and comment process specified in Mine Act § 101(a). A key exception to this regular process is the extraordinary procedure authorized by Mine Act § 101(b) in which MSHA can immediately promulgate an emergency temporary standard, which becomes effective upon publication in the Federal Register, if the Agency determines:

(A) that miners are exposed to *grave danger* from exposure to substances or agents determined to be toxic or physically harmful, *or to other hazards*, and (B) that such emergency standard is necessary to protect miners from such danger. (Emphasis added).

This extraordinary procedure should not be invoked lightly. As support for its finding of grave danger, MSHA has stated in the preamble to the ETS as follows:

Based on MSHA's accident investigation reports of the Sago and Darby mine explosions, . . . [NIOSH] reports on explosion testing and remodeling, MSHA's in-mine seal evaluations, and review of technical literature, MSHA has determined that new comprehensive standards for seal design approval, strength and installation approval, construction, maintenance and repair, sampling and monitoring, training and recordkeeping are necessary to immediately protect miners from hazards of sealed areas.

72 Fed. Reg. 28797 (footnotes omitted).

With all due respect to the Agency's assertions, the design of the seals used at both the Sago and Darby Mines were not implicated as causes of the respective methane explosions at those mines. In the case of the Sago Mine, the seals were not properly constructed. That was also the case at the Darby Mine, and MSHA's report focused on deficiencies in the construction of the seals as well as on unsafe mine practices.<sup>1</sup> As for the reliance by MSHA on the NIOSH Report, Alliance again specifically endorses and agrees with the comments of the NMA concerning the NIOSH Report, especially the document entitled "An Evaluation and Critique of the NIOSH Report: 'Explosion Pressure Design Criteria for New Seals in U.S. Coal Mines,'" prepared for the NMA by its consultant, Dr. Martin Hertzberg. Finally, Alliance believes that MSHA's finding of grave danger is incorrect because as noted above, for over 40 years, we have built thousands of seals in our underground mines and our experience has been that they do not pose any danger to our miners, let alone a *grave danger*.<sup>2</sup>

#### **MSHA'S ARBITRARY IMPLEMENTATION AND ENFORCEMENT OF ITS SEALS STANDARDS HAVE RESULTED IN NATION-WIDE CHAOS AND CONFUSION**

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Following the Sago and Darby Mine methane explosions in January and May, 2006, respectively, MSHA issued a series of policy pronouncements dealing with mine seals as follows:

- June 1, 2006, Program Information Bulletin No. P06-11, "Moratorium on Future Use of Alternative

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<sup>1</sup> See United States Department of Labor, Mine Safety and Health Administration, *Coal Mine Safety and Health Report of Investigation, Fatal Underground Coal Mine Explosion January 2, 2006, Sago Mine, Wolf Run Mining Company, Tallmansville, Upshur County, West Virginia* at 131-39 (available at <http://www.msha.gov/Fatals/2006/Sago/FTL06c1-12.pdf>); United States Department of Labor, Mine Safety and Health Administration, *Coal Mine Safety and Health Report of Investigation, Fatal Underground Coal Mine Explosion May 20, 2006, Darby Mine No. 1 Kentucky Darby LLC, Homes Mill, Harlan County, Kentucky* at 1, 30, 54-55 (available at <http://www.msha.gov/Fatals/2006/Darby/FTL06c2731.pdf>).

<sup>2</sup> Indeed, MSHA in the preamble to this ETS, fails to account for the effects of convergence on existing mine seals.

**Seal Methods and Materials Pursuant to 30 CFR 75.335 and Assessment of Existing Sealed Areas in Underground Bituminous Coal Mines”;**

- **June 12, 2006, Program Information Bulletin No. P06-12, “Reissued Moratorium on Future Use of Alternative Seal Methods and Materials Pursuant to 30 CFR 75.335 and Assessment of Existing Sealed Areas in Underground Bituminous Coal Mines. This revised Program Information Bulletin supersedes No. P06-11”;**
- **June 21, 2006, Program Information Bulletin No. P06-14, Reissue of PIB No. P06-12: “Use of Alternative Seal Methods and Materials Pursuant to 30 CFR 75.335(a)(2)”;**
- **July 19, 2006, Program Information Bulletin No. P06-16, “Use of Alternative Seal Methods and Materials Pursuant to 30 CFR 75.335(a)(2)”;** and
- **August 21, 2006, Procedure Instruction Letter No. 1-06-V-09, “Procedures for Approval of Alternative Seals.”**

As is evident from the bare titles of these policy pronouncements alone, following the Sago and Darby Mine explosions, MSHA’s focus on mine seals was constantly shifting resulting in enormous confusion and chaos for mine operators. Indeed, for all intents and purposes, the alternative seals standard legally allowed under 30 C.F.R. § 75.335(a)(2) was outlawed. A nationwide moratorium on such seals was in effect *de facto*, and the only mine seals allowed to be constructed were the Mitchell-Barrett seals described in 30 C.F.R. § 75.335(a)(1).

Then the Seals ETS was published on May 22, 2007, followed by a stream of similarly confusing policy interpretations and procedures, as is evidenced by even a cursory examination of MSHA’s Single Source Page for the Seals ETS. See <http://www.msha.gov/Seals/SealsSingleSource2007.asp>.

As discussed in our overview above, this continual stream of interpretative information policies and procedures, rather than clarifying the ETS and its often-vague terms, has led not only to nationwide chaos regarding the ETS, but also to chaotic situations on a District-by-District, mine-by-mine, and inspector-by-inspector basis. The result, as we understand it from other operators, and certainly

in the case of our operations, is that frequent citations are being issued for violations of the Seals ETS (oftentimes with mine-wide implications) based on confusing, contradictory, and opaque determinations on the part of MSHA inspection personnel.

Alliance is very concerned that a potential tragic outcome of the chaos and confusion that has been associated with MSHA's implementation and enforcement of the Seals ETS may be the injury or death of miners who are supposed to be protected by the ETS. We say this because it is our firmly-held belief (based on our experience in building thousands of seals over the past 40 years) that the all too common insistence, under the ETS, by MSHA enforcement personnel that new seals be built in front of existing seals poses wholly unnecessary safety problems. While we hope that no such tragedies will occur, we note that the Darby Mine explosion resulted from miners (following the Sago explosion) attempting to cut a metal strap on the inby and outby side of a previously constructed seal. The act of cutting the strap ignited a methane pocket. We must point out to MSHA that a tragedy like this could happen again if MSHA enforcement personnel require operators to take actions such as building new seals in front of old existing seals. That is why Alliance strongly believes that the Seals ETS diminishes the protection afforded miners by the previous standards set forth in § 75.335. In that regard, we also wish to point out to the Agency that the report of the Senate Committee on Health, Education, Labor and Pensions that accompanied S.2803 (the MINER Act as passed by the Senate) cautions as follows: "the Committee notes that the vast majority of existing seals are used to close off areas with stabilized levels of methane, the disturbance of which could create extreme and unnecessary danger."<sup>3</sup>

## CONCLUSION

To conclude, and to summarize our main points again, Alliance firmly believes that the Seals ETS is not supported by the requisite finding of "grave danger" on which the use of the extraordinary procedure specified in Mine Act § 101(b) is founded. We also believe that the Seals ETS sweeps with too broad a brush by outlawing the tried-and-true use of Mitchell-Barrett seals. Alliance is also terribly concerned that MSHA's implementation and enforcement of its Seals ETS has resulted in nation-wide chaos and confusion. Particularly troubling to us is the real danger posed to miners by the Agency's insistence, on too many occasions, that existing seals be strengthened to ETS specifications by building a new seal in front of the existing seal. That practice should be halted immediately because it poses a

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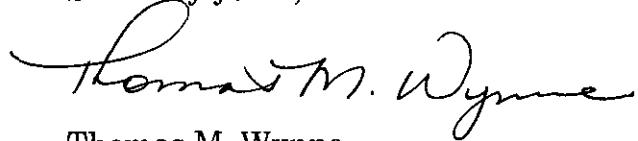
<sup>3</sup> S. Rep. No. 109-365, at 10 (2006).

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real threat to the safety of miners who are required by MSHA's enforcement personnel to engage in this work.

We appreciate the opportunity to provide you with these comments. Alliance is committed to and stands ready to work with MSHA to develop appropriate performance-oriented standards that meet the requirements of MINER Act § 10.

Sincerely yours,

A handwritten signature in black ink that reads "Thomas M. Wynne". The signature is written in a cursive style with a large, looping initial 'T'.

Thomas M. Wynne  
Vice President - Operations  
Alliance Coal, LLC