January 13, 2003

Marvin W. Nichols, Jr.
Office of Standards, Regulations, and Variances,
Mine Safety and Health Administration
Room 2313
1100 Wilson Blvd.
Arlington, Virginia 22209-3939

Re: Comments Concerning Emergency Temporary Standard on Emergency Evacuations

Dear Mr. Nichols:

RAG American Coal Holding, Inc. (RACH) submits the following comments on the Emergency Temporary Standard on Emergency Evacuations ("ETS") under 30 C.F.R., Parts 48 and 75 published in the December 12, 2002 Federal Register.

RACH's affiliates produced approximately 71 million tons of bituminous coal last year by both underground and surface methods. We operate large underground mines that utilize longwall equipment in Pennsylvania and Colorado and smaller underground mines that rely on continuous miners in West Virginia and Illinois, as well as large surface mines in the Powder River Basin and small surface mines in West Virginia.

It is with great reluctance that RACH opposes the issuance of portions of the Emergency Temporary Standard. RACH fully supports efforts to improve mine emergency response as well as the training of mine personnel to help improve their response to emergency situations. These are vital and necessary goals. Further, RACH has supported improved firefighting and mine escape techniques and is well qualified to comment on the ETS.

However, portions of the ETS are seriously flawed and RACH opposes the imposition of 30 C.F.R. § 75.1501 in its present form. The ETS is drafted in ambiguous language and without the essential exactness and precision. The ETS appears to be intended to permit the agency to second guess almost all post-emergency decisions of an operator so that citations can be issued. The ETS fosters the attitude that full scale mine-wide evacuation is always the first step in a mine emergency. Such approach

does not necessarily best foster the safety of underground miners. Finally, the basis for claiming an "emergency" exists to support MSHA's failure to conduct proper rulemaking is not supported by reliance on the accident at the Willow Creek Mine.

I. MSHA Has Not Demonstrated A Need for An Emergency Temporary Standard

The preamble to the ETS seeks to justify the issuance of the rule based upon an assertion that 14 miners died in two accidents as a result of "faulty mine evacuations." The Preliminary Regulatory Economic Analysis ("PREA") indicates that in the last two years these are the only two accidents that occurred where fatalities may have resulted from faulty evacuations. According to the PREA, those are the only incidents in the last 10 years that would be addressed by the standards.

One of the instances of so-called faulty mine evacuations referenced was at the Willow Creek Mine on July 31, 2000. RACH is in a unique position to comment upon reliance upon the use of this accident to support the ETS because the operator there, Plateau Mining Company, is one of its affiliates. The preamble and associated PREA assert that the two fatal injuries that occurred at Willow Creek "might not have occurred" if the decision to evacuate had been made sooner. See 67 Fed. Reg. 76660; PREA at 9. Such assertion is unfounded and irresponsible. MSHA's reliance on this accident does not support issuance of an ETS and this reliance undermines its attempt to establish a basis of the need for the issuance of a standard.

The facts of the situation at Willow Creek do not support the assertion that the evacuation was faulty and that the fatal injuries were the result of an untimely decision to evacuate. Further, MSHA's reliance on this accident demonstrates that it is approaching the issue of mine evacuations in an unrealistic fashion that is inconsistent with reasonable, rational regulation.

The facts at Willow Creek are relatively straightforward. At 11:48 p.m. on July 31, 2000 there was an event in the longwall gob that triggered a fire on the longwall face between the toes of the shields. MSHA describes the event as an explosion while RACH does not. It believes the event was a large roof fall. Whatever the ultimate conclusion might be, it is clear that this first event was believed by the majority of the people on the face to be a roof fall in the gob and not an explosion.

Seven minutes later, at 11:55 p.m., there was an explosion in the longwall gob that injured miners. One minute later, at 11:56 p.m., there was another explosion. At

12:17 a.m. there was probably a third explosion. The order to evacuate the face came moments before the 11:55 event.

According to MSHA's determinations in its accident investigation, the order to evacuate the other sections of the mine was given at 11:52 p.m. While MSHA appears to believe that the timing of the order to evacuate the rest of the mine is significant, the timing of such order was unrelated to the only injuries which occurred, those on or near the longwall face. See 67 Fed. Reg. 76660.

With respect to the ETS, the issue is when during the seven minute period between the first and second events should the order to evacuate the longwall face have been given. In this instance a person who would normally, under the proposed rule, have been responsible for ordering and conducting a mine evacuation, the shift foreman, was present on the longwall face at the time of events. Thus there was no opportunity for delays in communication or misapprehension of the facts that would normally occur in any emergency situation where the decision maker is not right on the scene. Willow Creek's emergency response was more immediate than could be expected under the ETS. It is inappropriate to use Willow Creek to justify the ETS because they responded appropriately and evacuated expeditiously.

The initial decision of the shift foreman and the crew was to attempt to extinguish the fire. The fire was present between the toes of the shields and the flames were not particularly high and this was a reasonable decision. Fire extinguishers and water were used to attempt to extinguish the fire but were unsuccessful. The shift foreman then made the decision to evacuate the face and all but two of the miners made it off the face in the short period of time before the explosion. He made that decision before 11:55 p.m. when the explosion occurred.

According to the shift foreman's testimony in MSHA's investigation, he made the decision to evacuate the face when he determined that the fire was not controllable, and that the methane levels were rising. He had already ordered the evacuation of the continuous miner sections, i.e., personnel not essential for addressing the emergency. By way of contrast, the preamble asserts that the foreman somehow should have known that the fire was uncontrollable at an earlier time and should have ordered evacuation then. 67 Fed. Reg. 76660. "MSHA has determined that had the decision to evacuate been made sooner, i.e., after it became evident that the fire was not controllable…the fatalities might not have occurred." 67 Fed. Reg. 76660. Such assertion is not only incorrect factually but it is unrealistic. The decision to evacuate both the mine and face were made in an expeditious fashion, within a few minutes of

the first event. It cannot be concluded that any other foreman or group of miners would have made such a decision in a shorter period of time, even if the ETS had been in effect.

Perhaps the assertion in the preamble is based, in some part, on the assumption that the first event at 11:48 p.m. was an explosion and that was recognized by the crew and the shift foreman. Whatever the merits of such assumption, it is clear from the testimony during MSHA's investigation that everyone on the face at the time believed that the first event was not an explosion but rather a fall of roof in the longwall gob. Such belief was justified because these experienced longwall miners recognized the sound of roof fall in the gob, one of the miners heard material falling on the back of the shields, and there was no heat associated with the first event.

But whatever the first event, there was minimal time to react to the events and MSHA's after-the-fact-second guessing demonstrates its unrealistic view of the reaction of miners in an emergency situation. In its own report of the Willow Creek accident MSHA did not come to the conclusion it now asserts to support the ETS. That report was a year in preparation. Over another year passed before MSHA announced its conclusion with respect to the timeliness of the evacuation at Willow Creek. Yet MSHA now announces that miners who had less than seven minutes to make an evaluation of a developing situation should have responded differently.

The only conclusion that can be drawn from what MSHA has done here in discussing the Willow Creek accident is that it will enforce this new standard in a wholly unrealistic fashion. Based on this, it is reasonable to conclude that the new standard is simply a tool so that, if an operator is so unfortunate as to have an emergency occur that results in injuries, MSHA will always have a violation to cite because it will be able to assert that evacuation should have been accomplished sooner. If less than seven minutes under the unique circumstances at Willow Creek was too long, there is no reasonable possibility that MSHA will ever judge an evacuation was performed quickly enough.

MSHA assumes that in an emergency the facts will all be immediately clear and understood and that communications will be perfect. Such assumption is incorrect and is entirely inconsistent with how information is gathered in an emergency. Information comes in bits and pieces and is not complete for a period of time. It also assumes that miners will not investigate unusual events or attempt to rescue fellow miners. Such expectations appear to also be unrealistic.

II. The Timing of the Issuance of the ETS

MSHA has in this instance exercised its authority under Section 101(b) of the Federal Mine Safety and Health Act ("the Act"), 30 U.S.C. § 811(b), to issue an emergency temporary standard bypassing the normal rulemaking procedures set out in Section 101(a) of the Act. The basis for the "emergency" are the facts developed in the agency's investigations of the accidents at Jim Walter and Willow Creek. The accident at Willow Creek occurred on July 31, 2000 and the investigative report was issued on July 17, 2001. The accident at Jim Walter occurred on September 23, 2001 and the report was issued December 11, 2002. The other incidents referred to in the preamble date to 1968, 1977 and 1978, hardly a justification for the existence of an "emergency."

There is nothing in all these incidents that indicate the development of a sudden emergency justifying the circumvention of normal rulemaking procedures. These are not the first tragic accidents where there were mine evacuations. They are not materially different in how evacuation was handled, although at Willow Creek it was more expeditious than in other such emergencies. The facts do not support the determination that an "emergency" exists.

It is curious also that the agency requires immediate compliance with a rule that it apparently has been developing for a period if time. The unfairness of such approach in the absence of a true "emergency" is manifest. This is the sort of issue that fully merits the open and frank discussion of the normal rulemaking process.

Moreover, it is additionally troublesome that MSHA issued the ETS on December 12, 2002, a time of year when it is difficult to assemble the appropriate personnel to develop comments on a rule. Given the absence of a true emergency, it would appear that the timing of the issuance of the ETS was intended to limit the potential for industry comments. This sort of circumvention of the notice and comment rulemaking procedures, for whatever reason, is improper and inappropriate.

III. The ETS Is Ambiguous

RACH's principal difficulty with the ETS concerns 30 C.F.R. § 75.1501. It has little difficulty with the changes to Part 48 and the redesignation of 30 C.F.R. § 75.1101-23 but it believes that Section 75.1501(a)(b) and (c) should be revoked because of their ambiguity and because they will not necessarily achieve the goal of making miners safer.

In discussing the ambiguity of the language of Section 75.1501, it should be recognized that RACH has no belief that the language will be interpreted as MSHA suggests it might be in the preamble and other information provided with the rule. It is RACH's position that, if MSHA believes that a particular "interpretation" is correct at this time, it should write that interpretation into the standard in specific language. Further it should eliminate, to the extent feasible, all ambiguity in the rule. If it cannot do so, it should revoke the rule. Already MSHA has developed compliance guides in question and answer format to help explain what the standard means. The fact that this was necessary make it clear that the standard is ambiguous.

The difficulty with an ambiguous standard that MSHA says will be interpreted in one fashion in a non-binding compliance guide is that MSHA inspectors can, and will, change its interpretation to suit the situation and will force upon the operator and the industry its interpretation of the moment. This is how MSHA inspectors have acted in the past and how, in light of its unreasonable expectations concerning mine evacuations as evidenced by its critique of Willow Creek, they may act in the future. Further, as discussed below, there are numerous ambiguities in the ETS that are not addressed in any compliance guide but that will become issues in the future.

As an agency, MSHA routinely and regularly argues in litigation that its interpretations are entitled to "deference" under Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1994). It argues that's its interpretations can not even be overturned by the Federal Mine Safety and Health Review Commission. See, e.g., Lastowka and Sapper, "Deference to Agency Interpretations: Abdication to Ambiguity," EMLF Proceedings (May 1999). It even develops new interpretations in the midst of litigation that it argues are entitled to deference. See, e.g., Island Creek Coal Co., 20 FMSHRC 14, 23 (Rev. Comm. 1998). In other words, it changes interpretations in mid stream and argues that it should have the advantage in arguing for its interpretation because it is MSHA. See, e.g., Akzo Nobel Salt v. FMSHRC, 212 F.3d 1301, 1304 (D.C. Cir. 2000). For this reason it cannot be relied upon to stay within the limits of any regulatory language it promulgates if that language is ambiguous in any fashion. In this instance, the ETS is rife with ambiguity.

A. Section 75.1501(a) is Ambiguous

The ambiguity begins with the very first sentence of Section 75.1501(a). It reads as follows:

> For each shift that miners work underground, there shall be in attendance a responsible person designated by the operator to take charge during mine emergencies involving a fire, explosion or gas or water inundations.

Most mine operators would read "responsible person designated by the operator" to mean that a person in a particular position, such as shift foreman, be designated, not a particular named person. This is how the questions and answers MSHA has developed appear to indicate the standard is to be interpreted:

> Q: Are specific names of the RP required or may the RP be assigned to a specific job title?
>
> A: Names or titles are acceptable so long as both the miners and the RP are informed of the critical designation and there is no uncertainty regarding the identity of the RP.

Despite this compliance answer, the standard is ambiguous because it can be argued that the operator must name a specific person rather than position. Section 75.1501(c) also indicates the operator shall instruct miners "in any change in the identity of the responsible person." The use of "identity" could indicate to some persons the naming of a particular person. The compliance guide question and answer itself refers to the "identity" of the responsible person suggesting that a specific name must be given. In fact, one of the inspectors has interpreted the ETS in exactly this fashion at one of our mines in the initial meetings concerning the ETS.

It is necessary that the operator be able to designate a position as responsible or a shift. For instance when working overtime, it is not uncommon for workers to overlap two or even three shift starts. These employees should be instructed on the work position that will control an emergency rather than a "person". The reality is that in almost all instances the workers know who is in charge. It should be written into the regulation itself so as to avoid any future interpretations. The present language requires a clarification concerning this. The standard should specifically say that an operator can identify a particular position as the "responsible person."

Further, this rule has more fundamental flaws in addition to its ambiguity. While the designation of a "responsible person" has a certain surface appeal, it fails to recognize certain realities. In any mine emergency, not only will the responsible person

at the mine be contacted but management persons off site may be contacted and may provide immediate input into the manner and method of evacuation. The way the rule is written, it is unclear if MSHA has taken into account this fact. It is necessary to account for the reasonably reliable cell phone communication that exists in many areas of the country. It is necessary to take into account the management structure at the mine. If the rule is retained, it should be clarified in the rule that the responsible person is responsible but can be superseded by another person with greater management authority.

If the rule is retained, it should also make clear that the responsible person is free to consult with persons off site. Most mines have a wealth of knowledge and experience available to the responsible person. By making one person singularly responsible for all decisions, the rule appears to cut the responsible person off from such resources as well as the potential for consultation on whether evacuation is prudent. This deficiency must be corrected.

Further, it may be that in an emergency, someone other than the responsible person will take it upon themselves to order evacuation of the mine. MSHA has tried to account for this in Section 75.1501(d) but it does not appear to us that MSHA has adequately addressed all the potential possibilities of the exercise of authority. The operator must have the authority to direct and manage an emergency even if direction is controlled by a person other than the so-called "responsible person." But there are other flaws in this concept of responsible person.

The ETS fails to account for the fact that the responsible person could be injured or trapped in the emergency. Further the responsible person might go to the scene and direct the operations and become unavailable for that reason. It also fails to consider that in any extended emergency, the responsible person will be superseded by a command center. The ETS needs to be changed to address this.

The list of information that the responsible person must know is not sufficiently specific as well as being so broad as to be entirely unrealistic. For example, the responsible person shall have knowledge of the "operation of the mine ventilation system." This is subject to varying interpretation. It could be interpreted to mean the responsible person must know the precise location of every stopping, every door, every overcast and every check curtain. It might be argued that the responsible person could be held responsible after the fact for not knowing the zones of influence in a multiple fan mine. He may be held accountable to knowing every intricacy of the electrical system, if

he is only shutting off power to a portion of the mine. Again this provides ample opportunity to issue citations based on post-emergency second guessing.

The rule does not specify the depth of knowledge necessary for compliance under the microscope of MSHA's post-accident hyper-critical scrutiny. The regulation should state that the responsible person have "general knowledge of…" so as not to subject the operator to a list of questions by inspectors and others that are not relevant to the intended purpose of the regulation. Basic understanding of the plans in place and the ventilation system should be required, but MSHA should not turn this into a test of minutiae. It should also recognize that the scope of the knowledge required is so great as to be unattainable if there is post accident scrutiny.

In similar fashion, the language concerning the responsible person's knowledge of the assigned location and expected movements of miners underground is not clear. For example, a shift foreman would know the initial assignments of employees on his shift but support workers such as mechanics may be sent during the shift to other jobs and the shift foreman may not be aware of these changes. The responsible person will also not know, for example, the location of every mine examiner who might be inspecting the bleeders or every miner who is delivering supplies around the mine or every parts runner traveling in the mine. It is not possible to know the location of all miners at all times who are underground but it is readily conceivable that in the next mine emergency when the responsible person cannot specifically pinpoint the location of every person in the mine at the exact moment in time MSHA will issue citations for violations of this standard.

Moreover, the ETS fails to consider the fact that the management of any mine relies upon an intricate support system of knowledge and skills. It places too heavy a burden of knowledge upon one individual and fails to consider the breathtaking scope of what the ETS expects the responsible person to know.

Other examples of the ambiguity of the ETS are also readily detected. Section 75.1501(a) also indicates it applies "for each shift the miners work underground." This is ambiguous because it does not address idle shifts where only examiners or a "fire checker" might be in the mine. They could be considered as "examining" rather than "working." Work could easily be construed as the act of doing a physical job, not inspecting the mine. The Questions and Answers on the website do not address this issue but interject ambiguity by expanding the definition to " whenever miners are scheduled to work or travel." See Question 2. The ETS once again needs to be specific to permit the agency no latitude of "interpretation." RACH does not believe a

responsible person as defined in the ETS necessarily needs to be present when only idle shift examinations or fire checking are occurring. If MSHA actually means that the standard applies whenever miners are underground, it should say so. If it means it applies only when miners are scheduled to work underground, it should make that clear. If it means it applies when miners are scheduled to work or perform examinations, it should make that clear.

In similar fashion we are concerned with the language of Section 75.1501(a) that requires a responsible person to be "in attendance." The Questions and Answers that were supplied indicate that this means this person has to have "ready access" to a communications system. See Question 4. The rule, of course, does not discuss in any fashion that there need to be any access and already MSHA is putting a gloss on the rule. Further it is a gloss that is subject to interpretation because it is not clear what is meant by "ready access." Is this going to require a PED system such as a few mines, including Willow Creek, have or will it be even more restrictive since such a system has limited information communication capability. Will a mine pager telephone system be adequate? Will two means of communication be necessary? Will two-way communication be necessary? We are concerned about this sort of issue because MSHA apparently believes that the responsible person must make a decision to evacuate within an unrealistically short time, moments after he has information that a mine emergency exists. Based on the preamble's rejection of a few minutes as an adequate period to decide if evacuation is necessary and to communicate that decision, it appears that something faster than instantaneous communication will be necessary.

B. Section 75.1501(b) is Ambiguous

Section 75.1501(b) continues the pattern of ambiguity. It states as follows:

> The responsible person shall initiate and conduct an immediate mine evacuation when there is a mine emergency which presents an imminent danger to miners due to fire or explosion or gas or water inundation. Only properly trained and equipped persons essential to respond to the mine emergency may remain underground.

First, it is not sufficiently clear as to what sort of condition will trigger an evacuation. The rule relies upon an "imminent danger" from certain types of events as a trigger for an evacuation. While there is a definition of "imminent danger" in Section

107 of the Federal Mine Safety and Health Act of 1977 we believe that the ETS, as written, can be "interpreted" to be far broader than it appears to be currently intended.

Upon reading the ETS, it seems to be directed to situations where a fire or explosion or inundation has actually occurred. However, we can readily conceive of situations that do not involve actual fires or explosions but rather potential fires or explosions, that MSHA will argue should trigger evacuations under the standard.

We believe that the standard should be modified to require the actual occurrence of the event to which it is directed since we presume that is what is intended in the ETS. We also believe that the standard must be clarified to indicate that it is not intended to address potential events rather than the actual occurrence of events.

For example, in the normal course of events, an inspector might issue an imminent danger order if he discovers 2.5% methane in a face area. See, e.g., Peabody Coal Co., 16 FMSHRC 523 (ALJ Amchan March 1994) (2.5%). While this type of situation may qualify as an "imminent danger" under MSHA's usual guidelines, it may not require evacuation of any person from the mine. It certainly is not a fire or explosion when it is discovered. Yet, it is easy to conceive of a situation where the inspector would assert that the entire mine should have been evacuated, although no fire or explosion was actually present. In similar fashion we can conceive of an inspector determining that there is an imminent danger present from a hot roller running in coal along a conveyor belt and citing the operator for not evacuating the mine. We can also easily conceive of an inspector citing the operator for failure to evacuate if there were a "gas inundation" on a longwall face from an intercepted abandoned well or methane bleeder.

This situation highlights the problem with the lack of clarity in the ETS. The ETS requires evacuations for gas or water "inundations." This term is problematic. It is defined in the Part 50 "yellow jacket" as "any disruption of regular mining activity by an in rush of liquid or gas" (T-3). It includes events such as the encountering of boreholes with water in them, abandoned oil wells and the like. See, e.g., Island Creek Coal Co., 20 FMSHRC 14 (Rev. Comm. 1998). The ETS fails to differentiate between mine-wide emergencies and situations specific to a limited portion of the mine. Most events would not normally be a basis for a mine-wide evacuation but we are not comfortable that an inspector will view them in such fashion.

No doubt MSHA believes that the restriction in the standard to a mine emergency that presents an imminent danger provides sufficient clarity. But RACH is not

comfortable it provides adequate protection. "Imminent dangers" will undoubtedly be viewed from the standpoint of the inspector who is always given the benefit of the doubt. An "imminent danger" has become under the cases decided by the Federal Mine Safety and Health Review Commission something of a subjective test because of the discretion afforded an inspector in making the determination. See, e.g., Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (Rev. Comm. November 1989); Utah Power & Light Co., 13 FMSHRC 1617, 1622 (Rev. Comm. October 1991). We believe that the responsible person should be given the benefit of the doubt in evaluating the hazard, not the inspector, but we recognize that the inspector's after-the-fact evaluation will prevail unless the standard is changed.

The standard also fails to distinguish between mine emergencies that affect a portion of the mine as opposed to those that pose a threat to the whole mine. This issue is addressed in greater detail below but it illustrates the ambiguity of the ETS. It is assumed that the ETS is directed only to those emergencies that imperil the whole mine, rather than some small part of it. Most emergencies do not require a full mine evacuation but the standard appears to require it.

The PREA asserts that the new rule will not result in any more mine evacuations than currently occur. We believe this is incorrect. MSHA in the PREA asserts that there will only be 5-10 false evacuations a year. We think that number is unrealistically low, just as we believe that MSHA's evaluation of the potential economic impact of such an evacuation of approximately $7068 is unrealistically low. It is our estimate that an evacuation will, in a large mine, cause at least one shift's disruption of operations. The cost of an evacuation, in wages alone, would probably range from $30,000 to $50,000 for a large mine. This does not even account for other costs and lost revenue, which may total $80,000 to $115,000 per shift.

Section 75.1501(b) also indicates that "only properly trained and equipped persons essential to the mine emergency may remain underground." This provision is ambiguous because it does not define what is meant by "properly trained and equipped." All miners are required to be trained to fight fires and there is fire fighting equipment available as specified by MSHA's standards. Yet, given the discussion of Willow Creek, it is unclear if such miners are considered "trained" and "equipped." The sense that RACH has is that MSHA intends this rule to limit the persons who can remain underground to mine rescue teams and perhaps specifically trained fire brigades. Such approach needs to be clarified because, if it is not, the first line of defense against emergencies, especially fires, the miners present in the area, will be removed from the scene before they can address the condition.

Section 75.1501(b) also requires the responsible person not only to "initiate" an "immediate" evacuation but to "conduct" one. This dual responsibility means that even if the evacuation was initiated in a timely fashion but it was not conducted quickly enough, in an inspector's view, the operator is subject to enforcement action. But evacuations typically do not occur instantaneously. They may require miles of walking in adverse conditions. It may take a period of time to contact everyone underground. Yet the responsible person is obligated to conduct an "immediate" evacuation. The ETS establishes a standard of performance that cannot be met.

C. The Thrust of the ETS is Misplaced

The thrust of the ETS appears to be directed to mine-wide evacuations. This is misdirected, is overly simplistic and may be dangerous. Handling mine emergencies is a complex matter which is not properly addressed by the ETS.

As written the standard places the responsible person in a position of evacuating the entire mine first and then determining the extent of the emergency. This is not a proper practice, nor is it logical. For example, in an explosion, a mine wide evacuation, where the speed of the evacuation is the responsible person's only concern, may be appropriate. However, in a mine fire, the speed at which effective fire-fighting response is taken is a much more important factor. There is a window of opportunity for controlling a fire that must be utilized or a far greater hazard will come into existence. It has been our experience that if rushed evacuation is fostered, miners will go so far as to overreact and "abandon" mine vehicles or mine supply cars on the haulage in order to evacuate "immediately." This may not be a correct approach depending on the circumstances. Yet the regulation will be used to second guess the responsible person's decisionmaking when he holds people in the mine for logical reasons based on the facts he has to work with at the time of the incident. While the rule provides that persons trained to respond to emergencies may potentially remain underground, it is believed that the thrust of the ETS is to promote evacuation in lieu of all other responses to the emergency.

Moreover, this rule appears to prohibit keeping persons underground in support roles. For example, in fire fighting the miners actually at the fire may need training in fire fighting but the support personnel handling supplies may not. This rule prohibits their remaining underground which would hamper rescue and other efforts.

Section 75.1501(b) requires the responsible person to "initiate and conduct an immediate evacuation when there is a mine emergency which presents an imminent

danger…" This language is not appropriate for the realities that may present themselves to a responsible person. It apparently does not permit withdrawal of miners to an unaffected area underground which is by far more common than mine wide evacuations. A full mine evacuation which may be unnecessary and counter-productive. First, it is important that the responsible person assure that employees are evacuated outby the affected area, i.e. to a safe area but not necessarily out of the mine on an initial determination of a problem, i.e. fire alarms, fan pressure drop, etc. Secondly, once the responsible person assures people are out of the immediate possible hazard area, then he must conduct an investigation as to the actual facts of the incident. Third, once the facts are gathered then the responsible person can "initiate and conduct" either an evacuation or take action to correct the problem. Fourth, the responsible person may determine that a mine wide evacuation is necessary but may require people to stay in the mine to notify people working in out of the way places or to clear haulages of vehicles so that an evacuation may be more orderly. In the above scenario, the responsible person may be acting appropriately but may not meet the "letter" of the proposed regulation.

The fact that a full scale evacuation is required may result in a substantial delay in addressing the emergency. This could result, for example, in the growth of a fire from a readily extinguishable size to one that is far more difficult, and dangerous, to fight.

Furthermore, the ETS is also drafted to ignore the realities of mine emergencies. Information is obtained in bits and pieces and responsible persons will have to act on the information they have. The ETS does not permit this. It requires a mine wide evacuation "when there is a mine emergency." The ETS is not drafted to require an evacuation when the responsible person knows, is aware, or has substantive information that a mine emergency exists. Given the fact that the regulations under the Act are interpreted as a matter of "strict liability," irrespective of the operator's knowledge of a condition, this ETS means that a violation would exist if a mine emergency and no evacuation occurred, irrespective of whether the responsible person had any information that an emergency existed. Such standard of conduct achieves no safety goal but rather is simply designed to punish the operator for having a mine emergency.

We believe it would be more appropriate to state in Section 75.1501(b), if it is retained, that the responsible person will direct an evacuation of employees from affected areas when an imminent danger due to the explosions, fires or inundations is determined to exist. He will direct employees when appropriate to organize fire fighting activities, water or gas inundation controls in the event of localized inundations or other

essential actions based upon his information available at the time. In the event he determines that the affected area of the imminent danger is mine-wide then an organized mine-wide evacuation will be initiated. The decision making necessary is not as simple as the ETS suggests it is.

If the ETS is to have any real value, other than punishment, it should establish a process of gathering information and acting on it appropriately, rather than fostering precipitous rushes from the mine.

The website indicates that evacuation plans can be written under 30 C.F.R. § 75.1502 by responding to 10 questions. Given the complexity of mine emergencies and MSHA's clear intent to enforce "the letter" of any such plans, they will have to be written with a view to avoiding such citations, rather than to accomplishing the objectives of mine emergency planning. If MSHA criticizes a mine for failing to commence evacuation of personnel addressing the emergency in less than 7 minutes as it did at Willow Creek, an operator must presume that MSHA will scrutinize its plans after an emergency in search of language it can use against the operator. MSHA has made it clear that the ETS is an enforcement tool, not a tool to provide for protection of miners. The operator cannot escape this when it prepares its plans or acts in an emergency. The rule may hamstring the actions of an operator and prevent it from acting prudently in an emergency. It cannot be second guessed if it ignores the consequences so long as it evacuates immediately, whatever that should mean. Such standard accomplishes no safety goal.

IV. DRILLS SHOULD BE MANAGED REALISTICALLY

Section 75.1502(c) requires miner emergency evacuation drills for "all miners" every 90 days. Such drills normally require evacuation of the mine, by means of the designated escapeways. Such drills currently require the preshift examination of the escapeways that will be used and seriously disrupt the normal pattern of mine examinations.

Because of issues such as vacations, use of personal days, illnesses and other absences, it can occur that miners miss the scheduled drill. The operator is then faced with either doing the drills more frequently than every 90 days so that it can have a makeup drill within the 90 day period or preventing the miner from working until the drill is performed for him or her individually. It is suggested that the standard be changed to permit a "grace period" of up to 10 days after the miner returns to work to have that

miner participate in a drill. That way the operator could include a number **of** miners who missed the scheduled drill in one "makeup" drill.

V. THE ETS SHOULD NOT BE EXPANDED

The preamble sought comments on whether the ETS **should** be expanded to include outbursts, massive roof falls and other occurrences. See 67 Fed. Reg, 76661. **RACH opposes** such expansion. **Such** events are of an entirely different nature than fires, explosions and inundations and should not be included. They do not have the ongoing impact of an event such **as a** fire or massive inundation. In fact, RACH believes that **if** the ETS is retained, its scope **should be** narrowed to include only those emergencies that have mine-wide impact or should be crafted to recognize that many "emergencies" even ones due to fire and inundations, **do** not require a full scale mine evacuation.

CONCLUSION

Based on the foregoing, we believe that Section 75.1 501 should be revoked. Our submission of comments **should** not **be** construed **as** an acceptance of the procedure MSHA used here to circumvent normal rulemaking, but we believe that MSHA should not have utilized the provision of Section 101(b) of the Act to **issue** an emergency temporary **standard.** The full and complete rulemaking process should have been utilized.

Very truly yours,

Charles Burggraf

Charles Burggraf

cc: