

# Pennsylvania Coal Association

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Room 2313  
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**Re: Comments Concerning Emergency Temporary Standard  
on Emergency Evacuations**

Dear Mr. Nichols:

The Pennsylvania Coal Association (PCA) 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.

PCA is a trade organization representing surface and underground coal operators that produce three-fourths of the bituminous coal annually mined in the Commonwealth and over 90 percent of the coal produced by underground mining methods. In addition, it represents companies whose existence depends in whole or in part on a robust coal industry by providing essential services, ranging from engineering and consulting to financial, insurance and the sale of mining equipment.

PCA opposes the issuance of portions of the Emergency Temporary Standard. PCA fully supports efforts to improve mine emergency response and training of for mine personnel to help improve their response to emergency situations, but the ETS is seriously flawed. PCA opposes

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**AB33-COMM-101**

the imposition of 30 C.F.R. § 75.1501 in its present form. The standard fails to take into account the complexities of mine emergencies. It fosters the attitude that full scale mine-wide evacuation is always the first step in a mine emergency. The ETS is also ambiguous and subject to interpretation which will permit the agency to cite almost all post-emergency decisions of an operator. Finally, no "emergency" exists to support the failure to conduct normal rulemaking.

#### **I. The Use of An Emergency Temporary Standard is Unnecessary and Improper**

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.

While PCA is not directly in a position to comment on the details of the Willow Creek or Jim Walter accidents, which are used to justify the existence of an "emergency," the reference to these accidents concerns PCA for several reasons. They are the only two such situations in the last ten years and, they are in and of themselves, 1-2 years in the past. They do not justify an emergency temporary standard. Further, reliance on the facts of the Willow Creek situation concern PCA because such reliance suggests that MSHA is approaching response to mine emergencies in a wholly unrealistic fashion. At Willow Creek, seven minutes elapsed between the first event and the second. The shift foreman, who would typically be the responsible person under the ETS, was present at the scene. Yet MSHA challenges his decisions to initially fight the fire and then to evacuate the face and the mine as not made quickly enough. Normally the decision to evacuate a mine would take longer because the responsible person would have to gather information in order to make a decision. Normally it would take longer because he would not have been at the site of the emergency. Even if he were "in attendance" it would have taken

time to reach him. MSHA apparently believes the gathering of information and decision to evacuate must occur instantaneously.

The only conclusion that can be drawn from what MSHA has done in discussing the Willow Creek accident is that it will enforce this new standard in a wholly unrealistic fashion. Based on this, PCA must conclude that the new standard is simply a tool so that an operator can be cited no matter the circumstances of the emergency. If less than seven minutes is too long to make a decision to evaluate a situation and evacuate, there is no reasonable possibility that MSHA will ever judge an evacuation was performed properly.

We are not familiar with the details of the Jim Walter accident but it has struck us that, in many ways, that situation was an aberration. There is no similar incident that we are aware of when so many miners were injured while going to the aid of an injured miner. It strikes us as particularly bad policy development to craft a rule designed to address an aberrational situation.

It also does not appear to us that the incidents at Willow Creek and Jim Walter indicate the existence of an emergency justifying the circumvention of normal rulemaking procedures. The agency has issued a ruling requiring immediate compliance concerning a subject that is complex and that would benefit from the full development of a standard through open rulemaking. The unfairness of the agency's approach in the absence of a true "emergency" causes PCA concern that the ETS will not take into account the comments of the regulated community.

It is also suspicious that MSHA issued the ETS at 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 Overly Simplistic and Unrealistic**

Sections 75.1501(a) and (b) of the ETS read as follows:

- (a) 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.
- (b) 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.

#### **A. The ETS Requires An Evacuation Even If Information is Not Available**

The ETS is drafted to ignore the realities of mine emergencies. During an emergency, 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 information that a mine emergency exists. Whether an emergency existed undoubtedly be interpreted after the fact. If a mine emergency existed, MSHA will find that a violation existed irrespective of what information the responsible person had and he will never have all the information that comes out after the emergency. The regulations under the Act are normally interpreted as a matter of "strict liability" irrespective of the operator's knowledge of a condition unless the standard requires prior knowledge. This ETS as drafted means that a violation would exist if a mine emergency existed and no "immediate" evacuation occurred,

irrespective of whether the responsible person had sufficient information to determine that an emergency existed. Such standard of conduct achieves no safety goal but rather is simply designed to guarantee punishment for the operator for having a mine emergency.

**B. The Thrust of the ETS is Misplaced**

The thrust of the ETS appears to be directed to requiring mine-wide evacuations in all circumstances. We believe that this is an improper way to approach the subject of mine emergencies. As written, the standard places the responsible person in a position of evacuating first and then determining the extent of the emergency. This is not a proper practice.

Full scale evacuation may not be a correct approach depending on the circumstances. 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 more important. There is a window of opportunity for controlling a fire that must be utilized or a far greater hazard will come into existence. In addition, in almost all mine emergencies, there is also a period of fact gathering where information is not complete. Yet the regulation will be used to second guess the responsible person's decision making 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.

This standard is not appropriate for the realities that may present themselves to a responsible person. First, when the responsible person becomes aware of a possible emergency, it is imperative that the responsible person find out what he can about the situation. Once he believes an emergency exists he then assures that employees are evacuated outby 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. but it is not necessarily appropriate to move them further. Secondly, once

the responsible person assures people are out of the immediate possible hazard area, then he must conduct further investigation as to the actual facts of what is occurring. 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. But, in the vast majority of cases, it is this sort of measured response that is the appropriate and safe course, not panicked evacuation.

It would be more appropriate to state in Section 75.1501(b) that the responsible person is to follow a decision making process involving investigation, determination of the extent of the hazard and evacuation of all or part of the mine if it is determined that such action is necessary. It would include a requirement that the responsible person will direct an evacuation of employees from affected areas when an imminent danger is determined. It would also include a directive that 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 the information available to him 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 but, if MSHA is serious about adopting a rule that reflects the proper method of addressing mine emergencies, it must reflect such a decision making process.

But the rule also requires evacuation of all persons except those "trained and equipped" and "essential to respond to the mine emergency." This does not take into account that in some emergencies considerable numbers of support personnel are necessary. They may not be

"trained" to fight a fire but they are necessary to transport supplies and equipment. These miners may be precluded from being underground under the ETS. The rule will handicap those persons left underground to address the condition and may endanger them as well as the mine itself.

Further, this rule has other fundamental flaws. 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 should be clarified in the rule that the responsible person is responsible unless superseded by another person with greater management authority. 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 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 is another flaw in this concept of responsible person.

The list of information that the responsible person must know is not sufficiently specific and is far too broad. For example, the responsible person is required to know "operation of the mine ventilation system." This 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

may 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.

The rule does not specify the depth of knowledge necessary for compliance under the microscope of MSHA's post-accident 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 non-essential knowledge.

In addition, by placing singular responsibility on one person, the ETS ignores the complexity of underground mines and mine emergencies. It assumes that the responsible person will not draw on the myriad sources of information and personnel resources available and necessary to address emergencies. The days of the omniscient and omnipotent mine foreman are past but the ETS seeks to revive them.

In similar fashion, the language concerning the responsible person's knowledge of the assigned location and expected movements of miners underground appears to be unnecessarily vague and overly broad. 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 an exact moment in time MSHA will issue citations for violations of this standard.

But perhaps the most unrealistic requirement of the ETS is that Section 75.1501(b) 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. 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.

#### **IV. THE ETS IS AMBIGUOUS**

PCA'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.

In discussing the ambiguity of the language of Section 75.1501, it should be recognized that PCA 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. The fact that MSHA has developed compliance guides in question and answer format to help explain what the standard means, makes it clear already that the standard is ambiguous. It is PCA's strong belief that, if MSHA believes that a particular "interpretation" is "correct" at this time, it should write that interpretation into the standard in specific language.

This is particularly true because MSHA routinely relies on the doctrine of judicial "deference" to an agency's interpretation. 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: Aiderate 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). It changes interpretations in mid stream. See, e.g., Akzo Nobel Salt v. FMSHRC, 212 F.3d 1301, 1304 (D.C. Cir. 2000). For this reason, any regulatory language it promulgates must avoid any ambiguity . But in this instance, the ETS is rife with ambiguity. The issuance of a compliance guide is not an answer to this problem, because MSHA can, and will, change its interpretation to suit the situation and will force upon the operator and the industry its interpretation of the moment. The compliance guides are not binding upon MSHA or its inspectors and they have, in the past, ignored them when it was convenient to support a citation. 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.

**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 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 Section 75.1501(c) indicates the operator shall instruct miners "in any change in the identity of the responsible person." The use of "identity" indicates to some persons the naming of a particular person. In fact, one of the inspectors has interpreted it in exactly this fashion at one of a PCA member's 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."

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 might be in the mine. They could be considered as "examining" rather than "working." 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." 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." Will a mine pager telephone system be adequate. Will two means of 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. Based on the preamble's rejection of seven minutes as an adequate period to gather information and decide if evacuation is necessary and to communicate that directive, it appears that something faster than instantaneous communication will be necessary. We are also concerned that some inspectors will interpret this rule to require the responsible person remain on the surface. Some inspectors already have said they will time how long it takes to contact the responsible person because they believe the only way to meet the standard is to put him on the surface.

**B. Section 75.1501(b) is Ambiguous**

Section 75.1501(b) of the ETS states in part 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.

This provision is also ambiguous. The rule relies upon an "imminent danger" 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" in MSHA's usual fashion to be far broader than it appears to be currently intended.

First, 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.

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. Further, it needs to be clarified that it does not apply to localized imminent dangers as opposed to ones that threaten the mine.

For example, in the normal course of events, an inspector might issue an imminent danger order if he discovers excessive methane in the face area. While this type of situation might qualify as an "imminent danger," it may not require evacuation of any person from the mine. 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.

These last two would qualify as mine emergencies requiring evacuation under the standard and they highlight the difficulty that is created by the standard. The ETS uses the term "inundation." 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). It also, of course, would include inundations of the order of Quecreek. The failure to distinguish the two types of events renders the ETS hopelessly ambiguous and unworkable.

Most such events would not normally be a basis for a mine-wide evacuation but we are not comfortable that an inspector will view it in such fashion or that the ETS accounts for the difference. No doubt MSHA believes that the restriction in the standard to a mine emergency that presents an imminent danger is sufficient clarification. But PCA 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 Review Commission something of a subjective test. 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). The standard is simply too broad and ambiguous to be workable.

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 PCA 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.

It is also unclear what is meant by "properly equipped." MSHA mandates the provision of certain firefighting equipment. Does the use of such equipment mean miners are properly equipped. It is recognized that MSHA has used such language because certain miners at Jim Walter who entered the explosion area did not have a methane detector. But this standard will be interpreted far more broadly to require fire turnout gear or mine rescue apparatus. The standard is simply too vague to work as intended.

## **V. THE ETS WILL RESULT IN MANY UNNECESSARY EVACUATIONS**

Section 75.1501(b) requires the responsible person to initiate an immediate evacuation "when there is a mine emergency that presents an imminent danger." We assume that this will be interpreted as Section 107(a) is. Inspectors are given the benefit of the doubt when in their evaluations of whether an imminent danger is present for the purpose of writing a withdrawal order. We believe a responsible person should be given the same sort of leeway to make an evaluation but we also are certain that the rule will be interpreted, absent clarifying language, to

give the MSHA inspector the benefit of the doubt in his determination that an imminent danger requiring evacuation existed.

The PREA asserts that the new rule will not result in any more mine evacuations than currently occur. MSHA in the PREA asserts that there will only be 5-10 false evacuations a year. We believe this is incorrect. While we think that number is unrealistically low we also believe that MSHA's evaluation of the potential economic impact of such evacuation of approximately \$7068 is absurdly low. We are totally perplexed at how such a miniscal number was arrived at. The lost wages alone in a large mine of an unnecessary evacuation easily reach \$30,000 and higher. This does not even take into account lost production. For a longwall lost production for a shift is often considered to cost \$250,000. Mine evacuations cause the loss of at least one full shift and the costs will far exceed the amount that MSHA has estimated.

### **CONCLUSION**

Based on the foregoing, we believe that Section 75.1501 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,

George L. Ellis