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November 10, 2008

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, BHP Billiton's Navajo Coal Company and San Juan Coal Company, Interwest Mining Company, and Peabody Energy on MSHA's Proposed Rule for Alcohol-and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance: RIN1219-AB41

Dear Ms. Silvey:

On behalf of our clients Alliance Coal, LLC, BHP Billiton's Navajo Coal Company and San Juan Coal Company, Interwest Mining Company, and Peabody Energy, we appreciate the opportunity to comment on the proposed rule published by the Mine Safety and Health Administration ("MSHA") in the Federal Register on September 8, 2008 (73 Fed. Reg. 52136), referred to as the "Alcohol- and Drug-Free Mines: Policy, Prohibitions, Testing, Training, and Assistance," hereinafter referred to simply as "the Rule."

Our clients – all major coal producers – firmly believe that alcohol and drug use by miners should be taken seriously and should not be tolerated in connection with the work of mining.[1] To that end, each has put into place their own extensive

[1] Alliance Coal, LLC ("Alliance") is a diversified coal producer with eight large underground mining complexes in Illinois, Indiana, Kentucky, and West Virginia. BHP Billiton's Navajo Coal Company and San Juan Coal Company, located in the Four Corners of Northwestern New Mexico, operate, respectively, the Navajo Mine, a large surface coal mine located within the boundaries of the Navajo Reservation and the San Juan Mine, an underground longwall operation. Interwest Mining Company, a subsidiary of PacificCorp, provides safety and

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alcohol- and drug-testing programs at their mines and the mines of their operating subsidiaries and affiliates. While we appreciate the time and effort that MSHA has put into the drafting of the Rule, and MSHA's sincere effort on this issue, we urge the Agency to withdraw the Rule for the following five reasons, all of which we explain in more detail below.

- First, and fundamentally, the Rule represents a step backward on mine safety from the programs our clients currently have in place. This is particularly true in connection with the Rule's prohibition of a "zero-tolerance" approach to substance abuse in the workplace specified in § 66.400(b) of the Rule, which flatly bars mine operators from terminating a miner who violates a mine operator's program for the first time.

- Second, we believe the Rule is *ultra vires* under the authority granted MSHA by the Federal Mine Safety and Health Act of 1977, as amended (the "Mine Act").

- Third, even if we assume *arguendo* that the Rule is authorized by the Mine Act, several key provisions are in conflict with or contrary to statutory Mine Act requirements.

- Fourth, MSHA has failed to satisfy basic precepts of the Administrative Procedure Act and the Data Quality Act in its efforts to justify and explain the Rule.

- Finally, the Rule is contrary to sound public policy and principles of good governance because, in important respects, it contravenes the requirements of and would confuse compliance with other federal and state laws and doctrines.[2]

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health and other management services to Energy West Mining Company's Deer Creek Underground Coal Mine in Utah and Pacific Minerals Inc.'s Bridger Underground and Surface Coal Mine in Wyoming. Peabody Energy is the world's largest private-sector coal company managing or owning interests in 31 mining operations in the United States and Australia.

[2] Moreover, the White House has advised against this very type of rulemaking in the waning days of the Administration. On May 9, 2008 the President's Chief of

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I. The Rule Represents a Step Backward on Mine Safety

In important respects, the Rule represents a step backward in miner safety from the programs our clients currently have in place. The stage for this enormously important problem is set at the very outset of the description of the Rule's "Purpose" section § 66.1, which provides:

> Alcohol- and drug-free mine programs established prior to the effective date of this rule that include consistent policies and alcohol- and drug-testing programs, and provide at least the same level of protection as these requirements, are in compliance with this standard.

73 Fed. Reg. at 52157.

The section-by-section discussion of the Rule, however, has no explanation of what is meant by the term "consistent" or the phrase "provide at least the same level of protection as these requirements." *Id.* at 52142. Worse yet, in its discussion of the effective date of the Rule, the preamble appears to be pull back from the aforementioned Rule language. *Id.* Thus, the preamble, in general, provides that mine operators must implement the requirements of the Rule from the time of its effective date (which presumably will be the date a final Rule is issued) as follows:

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Staff, Joshua Bolten, issued a memorandum addressed to the heads of all executive departments and agencies, including the Secretary of Labor. The memorandum recites the Administration's commitment to a principled approach to regulation in which the government is careful to not impose unnecessary costs on the American people and the economy. The memorandum cautions executive departments and agency heads to "resist the historical tendency . . . to increase regulatory activity" in the final months of the Bush Administration, and directs executive departments and agency heads to "avoid issuing regulations that are unnecessary." More specifically, it provides: "[e]xcept in extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008, and final regulations should be issued no later than November 1, 2008." The memorandum goes on to describe various administrative procedures to coordinate the issuance of new regulations, led by the Office of Information and Regulatory Affairs ("OIRA") of the Office of Management and Budget ("OMB"). There is no indication in the preamble of the Rule as to what, if any, consideration MSHA gave the Bolten memorandum.

> If an operator does not have an existing alcohol- and drug-free program, or has a program that is not consistent with the prohibitions or training requirements of the Rule or does not test for at least the specified substances, it must implement the Rule at least within one year of its effective date. *Id.*
>
> However, if the operator has an existing program that tests for at least the specified substances, and the program's prohibitions and training requirements are consistent with the Rule, then that operator will be deemed to be in compliance at the end of the first year, even if it uses different drug-testing technologies and procedures. However, if different drug-testing technologies and procedures are used, the operator would need to conform its technologies and procedures to those in the Rule by the end of the second year from the Rule's effective date, as well as conform to all other requirements of the Rule. *Id.*

Thus, in one fell swoop the preamble discussion summarized above confuses and is significantly at odds with the provisions of § 66.1 of the Rule itself. Indeed, the timeframe described in the preamble is not even part of the Rule.

In addition, the Rule itself deals only with existing alcohol- and drug-free mine programs established prior to the effective date of the Rule. It seems to us that *any alcohol and drug-free mine program established either prior to or after the effective date of the Rule which is consistent with the Rule and provides at least the same level of protection as does the Rule should be considered to be in compliance.*

The Rule's failure to squarely deal with its treatment of our clients' alcohol- and drug-testing programs, thus represents a step backward in miner safety from the programs our clients currently have in place. This is true not only in connection with the confidentiality aspects of our client's records currently in place, as we discuss more fully later in this letter, but it is particularly true in connection with the Rule's prohibition of a "zero-tolerance" approach to substance abuse as specified in § 66.400(b) of the Rule which flatly bars mine operators from terminating a miner who violates a mine operator's program for the first time.

In another backward step, § 66.2(b) of the Rule provides that the alcohol- and drug-testing provisions apply only to those miners who perform "safety-sensitive job duties." 73 Fed. Reg. at 52157. According to this provision, management and administrative personnel who supervise the performance of safety-sensitive job duties are also considered to hold safety-sensitive positions. However, general administrative and clerical personnel are not considered to hold

safety-sensitive positions. In its explanation of this distinction, the preamble speaks to making determinations on this issue consistent with the requirements of 30 C.F.R. Parts 46 and 48 for those individuals who must take comprehensive miner training. Furthermore, the "Definitions" provisions of § 66.3 of the Rule define the term "safety-sensitive job duties" as "[a]ny type of work activity where a momentary lapse of critical concentration could result in an accident, injury, or death." *Id.* at 52158.

Our clients, and many other operators currently implementing alcohol- and drug-free mine programs, include *all* company employees in the scope of program coverage. Thus, in such programs, alcohol- and drug-testing is far more comprehensive than what the Rule would require. MSHA should allow the continuation of these more comprehensive programs. We say this because to do so is consistent with the Mine Act itself, which does not distinguish between classes of employees, and, instead, defines the term "miner" to mean "any individual working in a coal or other mine." *See* Mine Act § 3(g). We believe that this broad, virtually all inclusive, definition buttresses the comprehensive programs of our clients and other operators who choose to test all company employees.

II. The Rule is *Ultra Vires* Because the Mine Act Contains No Authority for MSHA to Promulgate the Rule

Among the most fundamental pillars of the Mine Act are: (1) the establishment of interim mandatory safety standards; (2) the direction to MSHA to develop and promulgate improved mandatory safety standards to protect the safety of miners; and (3) the requirement that mine operators comply with such standards. *See* Mine Act § 2(g). Thus, the Mine Act regulates mine operator conduct and imposes certain obligations on mine operators to make their mines safe. The required mine operator conduct and obligations are set forth in great detail in the mandatory safety standards authorized by the Mine Act.

According to the Federal Register, the Rule purports to be an "improved mandatory safety standard." More specifically, at 73 Fed. Reg. 52157 MSHA states that the Rule will be codified in a new "Subchapter N–Uniform Mine Safety Standards," and the Agency claims the Rule is authorized under 30 U.S.C. § 811. That citation, which codifies Mine Act § 101, and the proposal to create new Subchapter N means that MSHA considers every provision of the Rule to be an "improved mandatory safety standard," compliance with which is a compulsory obligation for each and every mine operator. More specifically, this means that failure to comply with any provision of the Rule subjects mine operators to the full array of citations and orders mandated in Mine Act § 104 and the civil and criminal penalties specified in Mine Act § 110. These Mine Act enforcement

provisions, however, are particularly problematic because so much of the Rule is aimed at non-mining-related conduct of *individual miners* – and not the conduct of *mine operators.*

In short, the Rule would impose a wholly unprecedented level of responsibility on operators for the individual conduct of miners, not just at their mines but anywhere. We say this because the Rule makes operators responsible for not only the conduct of miners on mine property but also attempts to control the private conduct of individual miners that occurs off mine property on the individual miner's private time. However valid safety concerns may be in connection with use of alcohol and drugs off mine property, MSHA must recognize that operators are not their miners' parents. MSHA cannot force operators to control their miners' off-mine conduct, nor can MSHA mandate that mine operators be held responsible for such off-mine conduct. While miner safety is the paramount goal of the Mine Act, there are logical limits to how far MSHA can go in the name of carrying out its core mission. At some point, MSHA must rely on the judgment of the regulated mining community to honor its common sense obligations and its commitment to miner safety. We point out again that our clients are honoring those obligations and that commitment by having put into place their own extensive alcohol- and drug-testing programs.

Not only should MSHA refrain, as a prudential matter, from attempting to hold operators liable for individual conduct over which the operators have little or no control, but also the Agency is not authorized to do so under the Mine Act. This is evident from the structure and purpose of the Mine Act. More specifically, Mine Act § 3(l) defines the term "mandatory safety standard" to mean the interim safety standards established by Title III of the Mine Act and the standards promulgated pursuant to Mine Act § 101. Looking first to Mine Act Title III, "Interim Mandatory Safety Standards for Underground Coal Mines," Mine Act § 301(a) states that the provisions of Mine Act §§ 302-318 in Title III "shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by [MSHA] under the provisions of [Mine Act §] 101." According to Mine Act § 301(b), the purpose of establishing these interim mandatory safety standards was "to provide for the immediate application of mandatory safety standards developed on the basis of experience and advances in technology and to prevent newly created hazards resulting from new technology in coal mining."[3]

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[3] The focus on underground coal mining results from the origins of Mine Act Title III in the Mine Act's predecessor statute, the Federal Coal Mine Health and

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Importantly, these standards cover the areas of roof support, ventilation, combustible materials and rock dusting, electrical equipment, trailing cables, grounding, underground high-voltage distribution, underground low- and medium-voltage alternating current circuits, maps, blasting and explosives, hoisting and mantrips, emergency shelters, communications, and several other miscellaneous subject matters. All of these requirements regulated *operator conduct, and not the conduct of miners,* with the one exception of Mine Act § 317(c) which prohibited any person (including miners) from smoking or carrying smoking materials, matches, or lighters in underground coal mines.[4]

Furthermore, in describing the subject matter of *improved* safety standards, Mine Act § 301(b) focused on "hazards from trolley wires, trolley feeder wires, and signal wires, the splicing and use of trailing cables, and in connection with improvements in vulcanizing of electrical conductors, improvement in roof control measures, methane drainage in advance of mining, improved methods of measuring methane and other explosive gases and oxygen concentrations, and the use of improved underground equipment and other sources of power for such equipment."

It is quite apparent that the authority granted to MSHA to develop improved mandatory safety standards must have a nexus to the *conduct of mine operators* dealing with technology and mining conditions and systems – and not the non-mining-related conduct of miners.[5]

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Safety Act of 1969. Mine Act § 101, however, directs MSHA to develop improved mandatory safety standards for all mines.

[4] These standards are codified in 30 C.F.R. Part 75, along with improved mandatory safety standards, all of which govern the conduct of operators, with the exception of 30 C.F.R. § 75.1702 dealing with the prohibition on smoking. Similarly, 30 C.F.R. Parts 56, 57, and 77 contain mandatory standards for regulating the conduct of operators of mines, other than underground coal mines.

[5] The Conference Report accompanying the Federal Coal Mine Health and Safety Act of 1969 states that:

> The standards in [Title III] are interim until superseded in whole or in part by mandatory safety standards promulgated under section 101 of the [A]ct . . . . It is intended that these standards not be static, but that they

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The tension between regulating the conduct of mine operators and attempting to regulate the non-mining-related conduct of miners is at the heart of the fatal flaws of the Rule. To reiterate, much of the Rule is aimed at the conduct of individual miners, and not the conduct of mine operators. The Mine Act is aimed at a different purpose, however – it promotes miner safety by imposing mandatory obligations on mine operators. As construed over the years by the Federal Mine Safety and Health Review Commission and the courts, the Mine Act imposes strict liability on mine operators – if there is a violation, it is the operator who is responsible regardless of fault. It is, therefore, *operator* conduct, or at least the mining-related conduct of a miner over which the operator has a large measure of control that MSHA is authorized to regulate by the Mine Act.

Thus, even where regulations address individual conduct – *e.g.*, prohibition on smoking in underground coal mines; requirements that qualified persons perform mine examinations and specialized tasks; requirements for individual miner training for the work of mining – those types of regulations address conduct that occurs *at the mine* and *under the control of the operator*. Even the smoking prohibition is aimed at an obvious in-mine safety hazard. Common sense dictates that in an underground environment with easily ignitable and explosive substances (coal dust, methane), smoking and smoking materials should be prohibited. There is no prohibition, however, on miners smoking away from the underground coal mine environment, beyond both the control of the operator and the hazards of the mine environment. The prohibition is concerned with coal mine explosions and fires, and not with the effects of inhalation of tobacco smoke on the ability of a miner to safely perform his job.

As for the Rule, although we agree that performing mine work while under the influence of an intoxicating substance is not safe, ensuring compliance with the Rule will be far more difficult than ensuring compliance with the other types of regulations bearing on individual *mining-related* conduct. Simply stated, making mine operators responsible for the various kinds of conduct of miners that

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> be upgraded and improved to provide increased safety and, when necessary, to meet changes in technology and mining conditions and systems.

H.R. CONF. REP. No. 91-761, at 78 (1969).

are prohibited or regulated by the Rule presents a very difficult and burdensome (and often impossible) demand on mine operators.[6]

Because of this fundamental departure from the statutory scheme of the Mine Act's regulation of mine *operator* conduct, we submit that, notwithstanding MSHA's attempt to establish a new Subchapter N pursuant to Mine Act § 101, MSHA is not authorized by the Mine Act to promulgate this Rule as a mandatory safety standard.

III. Key Provisions of the Rule are in Conflict with or Contrary to Statutory Mine Act Requirements

Even if we assume *arguendo* that the Rule is authorized by the Mine Act, key provisions of the Rule are in conflict with or contrary to statutory Mine Act requirements.

Enforcement of the Rule

Thus, the preamble to the Rule appears to recognize the fundamental tension and inequities that will result from enforcement of the Rule in accordance with the enforcement provisions of the Mine Act, as evidenced by the following statement:

> Under the proposed rule, mine operators would generally be cited for failure to comply with the requirements to institute an alcohol- and drug-free mine policy and program. Several of those commenting on the [2005 advance notice of proposed rulemaking] expressed concern about whether mine operators should be held accountable for the actions of miners who violate the policy prohibiting use of alcohol or drugs while performing safety-sensitive job duties. It is not MSHA's intent to sanction mine operators who implement an alcohol- and drug-free mine program that includes alcohol- and drug-testing as prescribed in part 66, and who demonstrate *a good faith effort* to enforce their policy. However, mine operators who fail to implement and enforce these policies would be cited, specifically in cases where failure to enforce these

[6] To make matters worse, when an operator *is successful* at catching violators, the Rule's prohibition on zero-tolerance programs, § 66.400(b), does not even allow the operator full control over the discipline of the miner.

> provisions of the rule by monitoring miner compliance *results in fatalities, accidents or injuries.* MSHA invites comments as to appropriate means for enforcing the provisions of this proposed rule.

73 Fed Reg. at 52149 (emphasis added).

While MSHA appears, therefore, to have opened the door for discourse in its invitation to comment on appropriate means for enforcing the provisions of the Rule, in fact, there can be no real discussion so long as MSHA insists that the entire Rule is a mandatory safety standard. We say this because there is a real disconnect between the Rule and Mine Act tenets of law. Thus, in the abstract, while it may be sound policy to avoid sanctioning mine operators who "demonstrate a good faith effort to enforce their [alcohol- and drug-free mine] policy," *id.*, Congress long ago co-opted that policy. The Congress long ago decided that good faith efforts to comply with mandatory safety standards have no Mine Act significance except in the size of the civil penalty imposed for any violation. *See* Mine Act § 105(b)(1)(B). Similarly, the Congress long ago determined that citations for failure to comply with mandatory safety standards do not depend on whether such failures to comply result in fatalities, accidents, or injuries. The consequences of such failures to comply may compound a mine operator's enforcement sanctions, but they do not have anything to do with whether or not a citation will be issued for failure to comply with a mandatory safety standard. *See* Mine Act § 104(a). Simply stated, it is black letter law that a citation *must* be issued if MSHA believes a violation of a mandatory safety standard has occurred.

Another example of the failure of the Rule to comport with the basics of the Mine Act's enforcement scheme can be found in § 66.500(d)(1) of the Rule, dealing with MSHA inspections in connection with the Rule's "Record Keeping Requirements." 73 Fed. Reg. at 52163. This provision states:

> Mine operators' alcohol- and drug-free workplace policies and program descriptions should be made available to MSHA inspectors upon their request; *however, this rule does not require routine review of alcohol- and drug-free workplace programs by MSHA inspectors.*

(Emphasis added.)

It is simply unprecedented for the *very terms of any Mine Act mandatory safety standard to say that an MSHA inspector is not required to routinely review its provisions to determine mine operator compliance with its terms.* Indeed, this

provision is contrary to the Mine Act itself, since Mine Act § 104(a) specifically provides:

> If, upon inspection or investigation [an MSHA inspector] believes that a [mine] operator . . . has violated . . . any mandatory . . . safety standards . . . promulgated pursuant to this act, he shall with reasonable promptness, issue a citation to the [mine] operator.

See also Nat'l Cement Co. of Calif. v. Sec'y of Labor, 494 F.3d 1066, 1076 (D.C. Cir. 2007) (pointing out that where MSHA believes a violation has occurred, the Mine Act "mandates that a citation issue").

Furthermore, inspectors must inspect mines in their "entirety," in accordance with Mine Act § 103(a). With MSHA having been criticized so severely in recent months for allegedly failing to enforce the Mine Act, it is hard to comprehend how this Rule can conclude that mine inspectors need not routinely review alcohol- and drug-free programs during the course of their mine inspections.

In short, the tensions created by the efforts of the Rule to force mine operators to control the conduct of miners in connection with alcohol and drug use pose enormous conflicts with the enforcement requirements of the Mine Act.

In addition, the Rule, in important respects, is contrary to a number of statutory Mine Act requirements, as we now discuss.

Mine Act open-records requirements

Perhaps most glaring, in this respect, are the proposed recordkeeping requirements pertaining to alcohol- and drug-testing records, contained in § 66.500 of the Rule. To begin, this section of the Rule specifically states that "[r]ecords of drug- or alcohol-test results received are confidential communications between the mine operator and the miner." 73 Fed. Reg. at 52163. This provision is contradictory on its face, however, inasmuch as it requires post-accident test results to be included in operator accident reports submitted to MSHA pursuant to 30 C.F.R. Part 50 – and "any and all alcohol- or drug-test results to be made available upon request of MSHA inspectors or investigators." *Id.* This provision of the Rule also conflicts with at least two statutory provisions of the Mine Act that mandate broad access to miner records, as we describe below. It is therefore questionable whether MSHA, by law, truly will or can maintain the confidentiality of records under the Rule, as it states it will.

First, MSHA's confidentiality provision regarding drug and alcohol test results, coupled with the provision requiring inclusion of test results in Part 50 accident reports, is of concern in light of Mine Act § 103(d) which states that:

> [R]ecords of . . . accidents and investigations shall be kept and the information shall be made available to [MSHA] and the appropriate State agency. *Such records shall be open for inspection by interested persons. . . .*

(Emphasis added.) Because this provision requires that accident reports be accessible to both MSHA and the public, MSHA, therefore, cannot provide in the Rule for the confidentiality of testing results while at the same time requiring that post-accident test results be included in Part 50 accident reports.

Second, the purported confidentiality also raises a concern in light of Mine Act § 103(h) which states:

> In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as [MSHA or NIOSH] may reasonably require from time to time to enable [these agencies] to perform [their] functions under this Act. [MSHA or NIOSH are] authorized to compile, analyze, and publish . . . such reports or information so obtained. Except to the extent otherwise specifically provided by this Act, all records . . . required . . . pursuant to or under this Act may be published from time to time, *may be released to any interested person, and shall be made available for public inspection.*

(Emphasis added.)

Thus, for example, in its occupational noise rulemaking, MSHA asserted that Mine Act § 103(h) gave it "a statutory right to have access to records, including medical records." 64 Fed. Reg. 49548, 49625 (Sept. 13, 1999); *see also id.* at 49626 (stating that MSHA and NIOSH "have a statutory right to records and do not need the written consent of the miner").

MSHA took a similar position in the more recent rulemaking on exposure of underground metal-nonmetal miners to diesel particulate matter, asserting a broad right to access monitoring records under Mine Act § 103(c). *See* 66 Fed. Reg. at 5884 (Jan. 19, 2001). In the preamble discussion of records access in the diesel particulate matter rule, MSHA stated that "[*c*]*onsistent with the statute,*

upon request from [MSHA, NIOSH], or from the authorized representative of miners, mine operators are to promptly provide access to any [monitoring] record [required, including sample results]." *Id.* (emphasis added). *See also* 30 C.F.R. § 57.5075(b)(2) (providing for access to sample results).

In sum, MSHA's historic interpretations of these "open-record" provisions of the Mine Act raise grave concerns about MSHA's ability to maintain the "confidentiality" of alcohol- and drug-testing results, and even about MSHA's commitment to any such confidentiality. At the very least, they raise a very important question of how can MSHA harmonize the Rule to existing Mine Act provisions.

Mine Act jurisdiction

Another outright conflict between the Rule and Mine Act statutory requirements is the provision in § 66.2 of the Rule that it will apply "on and *around* mine property." *See* 73 Fed. Reg. 52157 (§ 66.2) (emphasis added). To that end, the Rule prohibits the use of drugs and alcohol "on or around mine property." *See id.* at 52158 (§ 66.100(a)). This vague, open-ended assertion of regulatory jurisdiction is alarming and improper. MSHA regulatory jurisdiction is limited to *mines*. *See* Mine Act § 3(h). Throughout the existence of the Mine Act, there has been frequent litigation on how broadly the Mine Act's definition of "mine" in Mine Act § 3(h) can be *properly* interpreted by MSHA to promote the safety and health objectives mandated by the Mine Act.

What is alarming about this aspect of the Rule is that MSHA has taken it upon itself – without any explanation in the preamble to the Rule – to regulate conduct not just at a mine, but "around" a mine. Operators, of course, may be able to hold their miners accountable if they observe conduct occurring off the mine that would have effects on the mine, but this is true regardless of where that conduct takes place (*e.g.*, a miner seen drinking a beer before his shift at a bar 30 miles from the mine site could be disciplined). It is another thing altogether, however, for MSHA to *regulate* an operator's conduct anywhere but on mine property, or to *require* mine operators to be responsible for everything that occurs *around* (but not at) the mine. MSHA simply does not have the authority to require that.

The Rule fails to consider the role of independent contractors under the Mine Act

Section 66.2(c) of the Rule states "[m]ine operators must inform all miners and contractors who perform work on their mine property of the requirements under this Rule." This provision appears to overlook the fact that independent

contractors are themselves "operators" under the Mine Act, and should be responsible for their own programs. *See* Mine Act § 3(d). There has long been a fractious debate between MSHA and "production operators" in connection with the liability of production operators for the Mine Act compliance of independent contractors. The Rule will exacerbate that debate by leaving open the question of whether independent contractors must develop and implement their own alcohol- and drug-testing programs.

IV. MSHA Has Failed to Satisfy Basic Precepts of the Administrative Procedure Act and the Data Quality Act in its Efforts to Justify and Explain the Rule

The Administrative Procedure Act

A standard test for whether an agency rulemaking satisfies the due process requirements of the Administrative Procedure Act is whether the rulemaking has been adequately explained in all of its particulars. For example, courts routinely ask whether a rulemaking is the product of reasoned decision-making, *i.e.*, has it been logically and coherently explained. If not, then it will be found to be arbitrary and capricious, and thus not valid.[7]

We believe that important aspects of this rule run afoul of the above-described test.

First, MSHA never explains why it is not proposing to adopt "zero-tolerance" policies, or why it requires miners who violate mine operators' policies for the first time to be provided with job security while the mine operator seeks appropriate evaluation and treatment for that miner.

Second, as we have discussed in detail above, the record-keeping provisions of the Rule are contradictory on their face. Aside from the fact that these provisions are violative of Mine Act "open-record" requirements, § 66.500(a)(1) says that records of test results are confidential between the operator and the miner. Yet, that very same rule states that all post-accident test results must be included in the operator's investigation report required by 30 C.F.R. § 50.11(d). MSHA never explains any of this.

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[7] *See, e.g., Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003) (rule should be set aside if agency "failed to consider relevant factors or made a manifest error in judgment").

Third, MSHA fails to explain why, in addition to posing the specific requirements of the Rule, it also goes on to insist that mine operators must follow the US Department of Transportation's ("DOT") requirements for transportation workplace testing programs set forth in 49 C.F.R. Part 40. *See* § 66.300(b) at 73 Fed. Reg. 52159. As we next discuss, this provision results in a number of problems that are left unexplained in the preamble to the Rule.

Testing methods are flawed

Recent Government Accountability Office ("GAO") reports and investigations have noted substantial problems with the DOT drug testing program. The GAO criticism reveals that MSHA appears to propose adopting an ineffective testing program.

Thus, GAO testimony regarding the drug testing program at the Federal Motor Carrier Safety Administration, which uses Part 40 testing, noted that "[l]ack of compliance appears to be widespread." GAO, *Motor Carrier Safety: Preliminary Information on Challenges to Ensuring the Integrity of Drug Testing Programs*, GAO-08-220T, (Washington, D.C.: November 1, 2007).

An undercover GAO investigation revealed that 22 out of 24 urine testing sites were not in compliance with GAO protocols. GAO, *Drug Testing: Undercover Tests Reveal Significant Vulnerabilities in DOT's Drug Testing Program*, GAO-08-225T (Washington, D.C.: November 1, 2007).

The GAO has also found that products to defraud drug tests are easily obtained by the public. GAO, *Drug Tests: Products to Defraud Drug Use Screening Tests Are Widely Available*, GAO-05-653T (Washington, D.C.: May 17, 2005). The GAO found these products "brazenly marketed on Web sites by vendors who boast of periodically reformulating their products so that they will not be detected in the drug test process...[t]he sheer number of these products, and the ease with which they are marketed and distributed through the Internet, present formidable obstacles to the integrity of the drug testing process." *Id.* at 2.

Another GAO report found that drivers who failed drug tests found employment with other employers by failing to disclose their prior employment. GAO, *Examples of Job Hopping by Commercial Drivers After Failing Drug Tests*, GAO-08-829R (Washington D.C.: June 30, 2008).

DOT's Part 40 is a moving target

The Part 40 testing requirements have been subject to frequent revision in recent years. Since 2000, DOT has amended Part 40 seven times by a final rule-

making. 73 Fed. Reg. 35961 (June 25, 2008); 71 Fed. Reg. 49382 (August 23, 2006); 69 Fed. Reg. 3021 (January 22, 2004); 69 Fed. Reg. 43946 (July 25, 2003); 67 Fed. Reg. 61521 (October 1, 2002); 66 Fed. Reg. 41944 (August 9, 2001); 65 Fed. Reg. 79462 (December 19, 2000). In addition, since 2000, DOT has amended Part 40 four times by an interim final rule-making. 73 Fed. Reg. 33735 (June 13, 2008); 72 Fed. Reg. 1298 (January 11, 2007); 69 Fed. Reg. 64865 (November 9, 2004); 69 Fed. Reg. 31624 (May 28, 2003). Thus, MSHA has proposed adopting a testing regime that is likely to remain a moving target, especially given the GAO criticism that the program has not as yet been effectively implemented. Given the potential complexity of combining Part 40 testing requirements with the requirements MSHA has set out in the Rule, continued revisions to Part 40 are likely to make compliance on the part of mine operators a moving and more confusing target.

Means of implementation is vague

On its face, the Rule does not consistently describe how the MSHA testing requirements will be implemented in conjunction with the Part 40 testing requirements. This suggests that MSHA itself does not yet understand how Part 40 and Part 66 should be implemented together.

The preamble to the Rule states that alcohol and drug testing "would need to be conducted consistently with the procedures incorporated by reference from DOT part 40, except in those places where specifically modified by this rule." 73 Fed. Reg. at 52142. The Rule itself states, however, that "[m]ine operators must follow the...(DOT) requirements found in 49 CFR part 40...in which references to 'DOT' shall be read as 'MSHA' with the following exceptions: the split sample method of collection shall be used, and use of 'bifurcated' alcohol level for testing is excluded." There is no limitation in the Rule itself to simply alcohol and drug testing. The Rule speaks to the DOT Part 40 requirements in their entirety. *Id.* at 52159.

Furthermore, a reading of Part 40 and the Rule shows that the Rule does in fact modify Part 40 in many more than two instances. Most notably, the Rule will change the requirements for laboratory certification, *compare* 49 C.F.R. § 40.81 *with* 73 Fed. Reg. 52157, and add five new drugs to the testing regime. *Compare* 49 C.F.R. § 40.85 *with* 73 Fed. Reg. 52159-60. Most notably, as we have often discussed in this letter, the Rule will prevent the firing of first-time violators, *compare* 49 C.F.R. § 40.305 *with* 73 Fed. Reg. 52161-62, while also requiring that employees receive drug treatment services. *Compare* 49 C.F.R. Subpart B and § 40.289 *with* 73 Fed. Reg. 52162 and § 66.400(b).

Interplay of MSHA's Rule and
DOT's Part 40 is confusing

In some cases, it may be difficult to determine where and how the Rule has "specifically modified" Part 40. For example, 49 C.F.R. § 40.5 provides that the DOT Office of General Counsel is responsible for issuing authoritative interpretations of Part 40. Because the proposed rule states that "DOT" should be read as "MSHA" throughout Part 40, *see* 73 Fed. Reg. 52159, it would appear that the Department of Labor ("DOL") Office of the Solicitor would be responsible for issuing interpretations of MSHA's Rule based on both Part 40 and Part 66. This outcome could easily result in the DOL Solicitor's Office and the DOT General Counsel's office issuing entirely different "official and authoritative interpretations" of MSHA and DOT requirements which are exactly the same.

The Data Quality Act

Under the Data Quality Act, MSHA is required to base this Rule on the most reliable, effective data available.[8] As we read the preamble, MSHA has failed to carry that burden. Thus, for example, in connection with its October 2005 advance notice of proposed rulemaking, MSHA specifically stated that comments provided "were anecdotal and data were not provided to specifically quantify the extent of the problem in the U.S. mining industry." 73 Fed. Reg. at 52138. In addition, MSHA takes note of the fact that Kentucky in July 2006 and Virginia in April 2007 passed drug-testing laws. *Id.* However, the preamble utterly fails to analyze the effect of those two statutes on the need for the Rule. MSHA also cites a number of media articles, which, since 2005, have highlighted drug use in coal mines. *Id.* at 52139. On behalf of our clients, we do not believe that rulemaking by newsprint satisfies the requirements of the Data Quality Act.

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[8] Section 515, Pub. L. 106-554 (2001). *See* "OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication." 67 Fed. Reg. 8452-8460 (Fri., Feb. 22, 2002). *See also*, DOL's "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Department of Labor," Oct. 1, 2002, found at http://www.dol.gov/cio/programs/infoguidelines/informationqualitytext.htm.

Indeed, in a key data point which does appear to be reliable and objective, little, if any, justification is provided for the Rule. More specifically, the preamble states:

> Data collected by [the Substance Abuse and Mental Health Services Administration of the Department of Health and Human Services] from individuals employed in the mining industry suggests that a significant number of mine operators perform pre-employment tests and perform random testing to discourage [drug] use among employed miners. Specifically, within the mining industry, nearly four out of five workers report that companies perform alcohol and drug tests on a pre-employment basis, which is nearly double the reported all-industry average. Similarly, nearly three-quarters of those working in the mine [sic] industry report random testing, which is more than double the reported all-industry average (of nearly 30 percent).

Id.

On behalf of our clients, all of whom have sophisticated and comprehensive alcohol- and drug-testing programs in place, we suggest that to the extent the preamble contains any reliable and objective data, it utterly fails to demonstrate a need for the Rule.

V. The Rule is Contrary to Sound Public Policy and Principles of Good Governance because it Contravenes the Requirements of and Would Confuse Compliance with Other Federal and State Laws and Doctrines

The Rule undermines the "employment-at-will" doctrine

A majority of jurisdictions in the United States adhere to the employment-at-will doctrine, which holds that an employer is free to terminate an individual's employment for any reason that is not barred by statute, contract, or other legal restriction. Section 66.400(b) of the Rule flatly bars mine operators from terminating an individual who violates an operator's program for the first time. This is a significant restriction on the right of employers with operations in jurisdictions that adhere to the employment-at-will doctrine and on the autonomy of mine operators to make their own personnel decisions. Many employers in such jurisdictions have adopted a "zero-tolerance" approach to substance abuse in the

workplace, pursuant to which an individual can be automatically terminated after the first violation.

The Rule undermines operators' autonomy with respect to labor management

Even putting aside the fact that the Rule disregards the employment-at-will doctrine, it convolutes an operator's discretion to take disciplinary action for violations that are part of the operator's program but not prescribed by MSHA in the Rule.

For example, if a mine operator's existing alcohol- and drug-testing program prohibits conduct on which the Rule is silent, the violation of which could be termination under the operator's existing program, it is unclear whether the Rule would prohibit such termination after the first offense (on the basis that the violation of that provision constitutes a first violation of the operator's "policy") or permit it (on the basis that it is "some separate terminable offense"). For example, if an existing program states that anyone seen drinking alcohol before a work-shift will be fired, that rule should be honored, regardless of the miner's blood alcohol content ("BAC") level, because the act of drinking might, on its own, be properly regarded as an act of insubordination. Such disciplinary choices are and should remain an operator's prerogative. It is not part of MSHA's statutory mandate or authority to interfere with operators' labor relations.

Another area of encroachment into employer autonomy is the BAC cut-off level of .04 percent. If an operator believes it would be safer for all concerned to enforce a cut-off BAC level of .02 percent, or even lower, then it should have the discretion to do so. As written, the Rule appears to prohibit an operator from establishing a lower BAC cut-off level.

The Rule conflicts with the Americans With Disabilities Act

The Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA") prohibits discrimination against a qualified individual with a disability because of that disability in regard to job application, hiring, advancement, or termination. The Rule is in tension with the ADA in the following ways.

First, with regard to drug testing, under the ADA, an employer may require a medical examination of an applicant only after making a conditional offer of employment to the job applicant. 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b). Tests designed to determine whether and how much alcohol an individual has consumed are medical examinations for purposes of the ADA and can lawfully be administered only after a conditional offer has been made. *EEOC: Enforcement*

Guidance on Disability-Related Inquiries and Medical Examinations Under the American with Disabilities Act, ADA Manual (BNA) 70:1116. MSHA appears to recognize this issue in § 66.304(b); 73 Fed. Reg. at 52148. On the other hand, the preamble to § 66.304 states that "because the ADA does not impose similar restrictions on drug-testing, mine operators can conduct those tests at any time in the application and hiring process and do not need to wait until a conditional offer of employment has been made." *Id.* 52148. This characterization of the ADA is misleading as it fails to differentiate between testing for illicit drugs and lawfully prescribed drugs prior to extending an offer of employment.

Tests intended or designed to determine the current *illegal* use of drugs are not considered medical examinations and, therefore, may be administered at the pre-offer stage. 42 U.S.C. § 12114. But a different rule applies to the use of *lawful* drugs, including medications obtained through a prescription. An employer may not seek information at the pre-offer stage about current or prior *lawful* drug use if such information could reveal the existence, nature, or severity of a disability. Consequently, employers who conduct pre-employment drug testing must either avoid all drug testing until after a conditional offer has been made, or must limit pre-employment drug testing to the identification of *illegal* drugs. Section 66.301 of the Rule lists the categories of drugs for which mine operators must test, including prescription drugs. *Id.* 52159-52160. The Rule could, therefore, very well lead mine operators to unwittingly violate the ADA and leave them exposed to liability.

Second, as we have discussed previously, many employers across the country, including mine operators, have adopted a "zero-tolerance" approach to drug and alcohol abuse in the workplace. Under this approach, an incumbent employee is automatically terminated after the first violation of the company's policy. Section 66.400(b) of the Rule prohibits mine operators from terminating an individual who tests positive for alcohol or drugs for the first time. Specifically, miners testing positive for the first time, who have not committed some other separate terminable offense, must be provided job security while they seek appropriate evaluation and treatment. Requiring mine operators to employ a one-strike policy is a significant restriction on the right of employers to maintain zero-tolerance policies, which has been specifically preserved under the ADA.

Thus, under the ADA, the term "qualified individual with a disability" is defined as an individual with a disability who can, with or without reasonable accommodation, perform the essential functions of the job. 42 U.S.C. § 12111. Specifically excluded from this definition is any employee or applicant who is currently engaging in the illegal use of drugs. 42 U.S.C. § 12114(a). Consequently, an employer may refuse to hire, advance, or discharge a person who

is currently engaging in the illegal use of drugs without violating the ADA. The legislative history of the ADA confirms that the main purpose of the current user exception was to ensure that employers retain the ability to have drug-free workplaces and implement zero-tolerance policies with respect to illegal drugs. The ADA further provides that employers may prohibit the use of alcohol in the workplace and may require that employees not be under the influence of alcohol at the workplace. 42 U.S.C.§ 12114(c).

Ability to perform the essential functions of the job

The Rule fails to address how operators may treat an employee who appropriately takes a prescription drug which nonetheless may affect his ability to perform his job safely. In the usual case, an employer would have to determine whether the applicant or employee could perform the job safely while taking his medication, ever mindful of constraints under the ADA, *i.e.*, can the employee still perform the "essential functions of the job." If the employee cannot perform the essential functions of the job while taking the prescription medication, then the employer may choose not to hire the applicant or terminate the employee. If the employee can still perform the essential functions of the job, however, the employer cannot refuse to hire him, nor can the employee be discharged. The employer may also be required, if necessary, to provide a "reasonable accommodation" to the applicant or employee. Under our clients' existing programs, if a miner cannot safely perform his or her job while taking a medical prescription, he or she is either placed in another position or directed to take leave, as necessary.

As written, it is unclear whether the Rule permits these existing, common-sense policies. Section 66.101(b)(2) excuses drug use where the miner "has a valid prescription for the prohibited substance and is using it as prescribed." By its terms, however, the Rule fails to acknowledge the scenario discussed above where proper use of a prescription nonetheless impairs the miner's ability to perform his or her job (*e.g.*, operate heavy-duty equipment).

The Rule would lead to confusion in light of the Family Medical Leave Act ("FMLA")

The FMLA provides covered employees with up to 12 weeks of unpaid, job-protected leave each year to care for themselves or immediate family members who have a serious health condition. The FMLA also requires that the employer maintain the employee's group health benefits during the leave. The one-strike provision in § 66.400, which requires mine operators to provide job security to miners who test positive for drugs or alcohol for the first time while the miner seeks appropriate evaluation and treatment, could trigger FMLA obligations. If

the Substance Abuse Professional recommends in-patient treatment for drug or alcohol addiction, which requires a leave of absence, such a leave would most likely be covered by the FMLA. Consequently, the mine operator would have to continue to pay health insurance premiums for a miner whom it would have otherwise discharged. This is yet another confusing aspect of the one-strike provision where a zero-tolerance policy would otherwise be in effect. Operators should be permitted to terminate all violators – it is both the safe and fair means of addressing a violation.

The Rule poses difficult preemption issues in light of existing state laws

Kentucky and Virginia have now enacted legislation addressing the issue of drug- and alcohol-testing in the mining industry. KY. REV. STAT. ANN. § 351.010 *et seq.* (2008); VA CODE ANN. §45.1-161.30 *et seq.* (2008). These statutes require a person to obtain a certification, administered by a state agency, in order to work as a miner. Under both laws, if a miner fails a drug or alcohol test administered by the mine operator, the miner's certification will be suspended. These laws do not, however, dictate what action a mine operator must take in regard to a miner who fails a drug or alcohol test. Consequently, a mine operator in either state is free to transfer the employee to non-mining duties, suspend the employee until his/her certification has been reinstated, or discharge the employee pursuant to a zero-tolerance drug and alcohol policy.

In contrast to the Kentucky and Virginia laws, as we have discussed previously, § 66.400 of the Rule specifically prohibits mine operators from discharging miners who test positive for drugs or alcohol for the first time (so long as they have not committed some separate terminable offense) while these miners seek appropriate evaluation and treatment.[9] This significant difference between the Kentucky and Virginia laws and the Rule presents the question of whether the Rule preempts the Kentucky and Virginia state laws.

Mine Act § 506 addresses the effect of mandatory safety and health standards in relation to state laws.[10] Subsection 506(a) makes clear that any

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9 Furthermore, although it is ambiguous as currently written, if the intent of this provision is to grant job security as well to a miner who adulterates a specimen, then it would be at odds with certain state criminal laws.

10 Section 506 of the Mine Act provides:

(continued...)

health and safety standard promulgated under the Mine Act shall not supersede state law unless that state law is in conflict with the federal standard. Subsection 506(b) specifically states that any state law provision that contains more stringent health and safety standards shall not be considered in conflict with the Mine Act. We think the state laws are more protective and should survive.

The Kentucky and Virginia state miner certification laws only require that miners have certifications; they do not directly prescribe employer action as to miners who test positive on alcohol or drug tests. These state schemes, therefore, allow for employers to have zero-tolerance policies. Section 66.400 of the Rule, in contrast, specifically requires mine operators to retain miners who test positive for drugs or alcohol for the first time while they are getting evaluated and treated. And § 66.1 of the Rule, states that "mine programs established prior to the effective date of this rule that include consistent policies, and alcohol- and drug-testing programs, and provide at least the same level of protection as these requirements, are in compliance with this standard." 73 Fed. Reg. 52157. The fact that at least some mine operators currently have zero-tolerance policies, which are certainly more protective than the proposed one-strike policy, coupled with the language of §§ 66.400 and 66.1, creates uncertainty as to whether mine operators could continue their existing zero-tolerance policies if the Rule becomes final. At a minimum, the prohibition on zero-tolerance improperly injects MSHA into a mine's labor relations, a function it is not empowered, and should not be expected, to perform.

(continued)

> (a) No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this Act or order issued or any mandatory health or safety standard, except insofar as such State law is in conflict with this Act or with any order issued or any mandatory health or safety standard.
>
> (b) The provisions of any State law or regulation in effect upon the operative date of this Act, or which may become effective thereafter, which provide for more stringent health and safety standards applicable to coal or other mines than do the provisions of this Act or any order issued or any mandatory health or safety standard shall not thereby be construed or held to be in conflict with this Act.

MSHA has failed to comply with its statutory obligation to notify the Office of National Drug Control Policy about the Rule

There is no evidence in the preamble to indicate that MSHA has complied with its statutory obligation to notify the White House Office of National Drug Control Policy ("ONDCP") regarding the Rule, which constitutes a proposed change to Department of Labor ("DOL") and MSHA drug policy. More specifically, in accordance with the Office of National Drug Control Policy Reauthorization Act of 1998 (30 U.S.C. §§ 1701, *et seq.*), MSHA is a "National Drug Control Program ("NDCP") Agency" because it is responsible for implementing a portion of the National Drug Control Strategy. *Id.* at § 1701 (7). The National Drug Control Strategy is developed and submitted to Congress by the President each year. *Id.* at § 1705. The National Drug Control Strategy for 2008 includes the "Drug Free Workplace Program," in which DOL and MSHA have been and continue to be important participants.[11] As the 2008 Strategy notes "federal agencies such as . . . [DOL] . . . encourage the adoption of drug-free workplace programs in both the private and public sector and will continue to advocate for random testing of employees."[12] In particular, DOL's "Working Partners for an Alcohol- and Drug-Free Workplace" promote drug-free workplace programs by maintaining a comprehensive web site (www.dol.gov/workingpartners). MSHA is actively engaged in these DOL initiatives, including the Working Partners Program, the Drug-Free Workplace Alliance, and other programs.

In light of the above, MSHA is required by law to notify the ONDCP Director about the Rule because it works a dramatic change in MSHA's current voluntary, cooperative approach to confronting drug use in the mining industry. There is no evidence in the preamble to the rule that MSHA has complied with this statutory requirement.

The Rule is inconsistent with the tribal consultation requirements of Executive Order 13175

On behalf of our clients, BHP Billiton's Navajo Coal Mining Company and San Juan Coal Company, and Peabody Energy's subsidiary, Peabody Western

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11 The 2008 National Drug Control Strategy is available at http://www.whitehousedrugpolicy.gov/publications/policy/ndcs08/2008ndcs.pdf.

12 2008 Strategy at 11.

Coal Co., we believe that MSHA has failed to comply with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments."

The mines operated by BHP Billton's Navajo Coal Company and San Juan Coal Company are located on or near the Navajo Indian Reservation in Northwestern New Mexico and 65% of the 1009 people employed at these mines are Native Americans. Peabody Western Coal Co. operates the Kayenta Mine in Northeastern Arizona through lease arrangements with the Navajo Nation and the Hopi Tribe. Approximately 93% of the total work force of approximately 429 employees are Native Americans.

Executive Order 13175 directs federal agencies to "have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." 65 Fed. Reg. 67249, 67250 (Nov. 9, 2000). The Executive Order defines "policies that have tribal implications" to include "regulations" that have "substantial direct effects on one or more Indian tribes." *Id.* at 67249. In particular, federal agencies, before promulgating a regulation that has tribal implications are required "[t]o the extent practicable and permitted by law . . . [t]o consult with tribal officials early in the process of developing the proposed regulation," and to "write a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials." *Id.* at 67249-67250.

In the preamble to the Rule, MSHA states that the "proposed rule would not have 'tribal implications' because it does not 'have substantial direct effects on one or more Indian tribes . . . . 73 Fed. Reg. 52156. Consequently, according to the preamble, "no further agency action or analysis" is required pursuant to this Executive Order. *Id.*

This conclusion is clearly erroneous on its face. BHP Billiton's Navajo Coal Company and San Juan Coal Company and Peabody Western Coal Co. must insist that MSHA fully comply with Executive Order 13175.

The Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), requires federal agencies, like MSHA, to consider the special needs and concerns of small entities whenever they engage in rulemaking subject to the notice-and-comment requirements of the APA or other laws. 5 U.S.C. §§ 601-612. Thus, each time MSHA publishes a proposed rule in the Federal Register, it must prepare and publish a regulatory flexibility analysis describing the impact of the proposed rule on small entities (including

small businesses, organizations, and governmental jurisdictions), unless the agency head certifies that the proposed rule "will not, if promulgated, have a significant economic impact on a substantial number of small entities." *Id.* § 605(b). In the case of the Rule, according to its preamble:

> MSHA has analyzed the impact of the proposed rule on small entities. Based on the analysis, MSHA certifies that the proposed rule does not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is presented in the [Preliminary Regulatory Economic Analysis ("PREA") for the Rule].

73 Fed. Reg. 52154.

We have worked closely with the Small Business Administration's Office of Advocacy ("SBA Advocacy Office") in connection with our concerns about the Rule. In that regard, we have carefully reviewed the SBA Advocacy Office's letter of November 6, 2008 commenting on the Rule. We wish to associate ourselves with that letter and we incorporate it by reference as though fully set forth herein. In specific regard to the requirements of the RFA, as amended by SBRFEA, we endorse the comments and recommendations set forth in Items 3, 4, and 8 of the SBA Advocacy Office's November 6 letter. MSHA should revise its PREA, and thoroughly reconsider the need for a regulatory flexibility analysis.

* * *

To conclude, our clients appreciate MSHA's interest in the important issue of alcohol and drug abuse in our industry. For all the reasons identified above, however, we wish to reiterate that the Rule should be withdrawn. We trust you will find these comments to be useful and persuasive; and please know that we are prepared to meet with MSHA, DOL, OMB-OIRA, and ONDCP officials to discuss the Rule and alternatives to it.

Sincerely yours,

Edward M. Green
Daniel W. Wolff
Thomas P. Gies

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