Thomas M. Wynne
Vice President - Operations

January 18, 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: **Supplemental Comments of Alliance Coal, LLC on MSHA's Emergency Temporary Standard for Sealing of Abandoned Areas in Underground Coal Mines: RIN 1219-AB 52**

Dear Ms. Silvey:

Set forth below are the supplemental comments of Alliance Coal, LLC ("Alliance") on the subject emergency temporary standard ("Seals ETS"), published as a final rule in the *Federal Register* for May 22, 2007 (72 Fed. Reg. 28796). Alliance filed detailed comments on the Seals ETS on September 17, 2007. We incorporate those comments by reference as though fully set forth. The purpose of this letter is to provide MSHA with our supplemental comments on the Seals ETS pursuant to the Agency's December 19, 2007 *Federal Register* notice reopening the Seals ETS comment period for the purpose of providing "commenters time to review and submit comments on the US Army Corps of Engineers' Draft Report 'CFD [Computational Fluid Dynamics] Study and Structural Analysis of the Sago Mine Accident,' (the "COE Draft Report") . . . as it relates to the regulatory provisions in the ETS." 72 Fed. Reg. 71791-71792.

Alliance is a diversified coal producer with eight large underground coal mining complexes in Illinois, Indiana, Kentucky, West Virginia, and Maryland. Thus, Alliance's underground coal mines are operating in four MSHA Coal Mine Safety and Health districts, specifically, Districts 3, 6, 8, and 10. Alliance is also a member of the National Mining Association ("NMA"). As such, we hereby endorse and adopt the comments of NMA regarding the December 19, 2007 notice reopening the Seals ETS comment period, and hereby incorporate them by reference in our

771 Corporate Drive Suite 500 Lexington, Kentucky 40503
Telephone: (859) 224-7236 Fax: (859) 224-7239 Email: tom.wynne@arlp.com

comments as though fully set forth. Finally, we wish to endorse the statement of Mr. Murali M. Gadde, Senior Engineer Ground Control, Peabody Energy, presented at MSHA's public hearing on January 15 in connection with the reopening of the Seals ETS comment period.

Specific Comments re the COE Draft Report

With regard to the COE Draft Report, Alliance firmly believes that MSHA should not rely on it as a basis for increasing the pounds per square inch ("psi") overpressures specified in 30 C.F.R. § 75.335(a)(1), (2), and (3) of the Seals ETS. Specifically, the COE Draft Report does not lend any credence to the flawed report of the National Institute for Occupational Safety and Health ("NIOSH"), "Explosion Pressure Design Criteria for New Seals in U.S. Coal Mines," Information Circular 9500 (2007) (the "NIOSH Seals Report"). In this regard, Alliance wishes to reaffirm our endorsement of the technical evaluations of the NIOSH Seals Report, commissioned by NMA, performed by Dr. Martin Hertzberg, Packer Engineering, Inc., and Baker Engineering and Risk Consultants, Inc. Those technical evaluations were furnished to MSHA as part of NMA's September 17, 2007 comments.

Alliance also submits that the COE Draft Report is fundamentally flawed. Thus, Alliance concurs with the evaluation of the COE Draft Report contained in the December 7, 2007 "MEMORANDUM FOR: THE FILE," prepared by MSHA's Acting Director of Technical Support, Linda F. Zeiler, critiquing the COE Draft Report. Briefly stated, in addition to all the technical flaws described by Ms. Zeiler in connection with the COE Draft Report and by NMA's consultants regarding the NIOSH Seals Report, perhaps Peabody Energy's Mr. Gadde summarized it best at the January 15 public hearing when he said that while the use of seals modeling can be valuable for research purposes, it is insufficient for purposes of prediction.[1]

Not only is the COE Draft Report unsuitable for use as a predictive tool, it is also legally unsuitable for this purpose. In this regard we urge MSHA to consider the quality of the COE Draft Report in the context of the final guidelines of the Office of Management and Budget ("OMB") and the Department of Labor's own guidelines for ensuring and maximizing the quality, objectivity, utility, and

---

[1] Alliance also endorses the critique of the COE Draft Report prepared by NMA's consultant, Baker Engineering and Risk Consultants, Inc.

integrity of information disseminated by federal agencies such as MSHA.[2] These guidelines implement Section 515 of the Treasury And General Government Appropriations Act For Fiscal Year 2001 (Public Law 106-554, December 2000). This provision, known as the Data Quality Act, can be capsulized in the context of the COE Draft Report as requiring peer review, a process to which the COE Draft Report has not been subjected.[3] Because the COE Draft Report has not been subjected to peer review, it should not be utilized, in any manner whatsoever, as the basis for increasing the psi overpressures currently in the Seals ETS.

Specific Comments Relating to the
Regulatory Provisions in the Seals ETS

MSHA's Regulatory Economic Analysis of the Seals ETS –

Alliance wishes to comment on the benefits and costs of the Seals ETS, as described in MSHA's May 2007 "Regulatory Economic Analysis For Sealing Of Abandoned Areas Emergency Temporary Standard." (the "REA"). Thus, with regard to the benefits of the Seals ETS, Alliance notes that MSHA stated, at page 9 of the REA, as follows:

> To provide a preliminary quantitative estimate of benefits, MSHA analyzed the explosions in sealed areas that have taken place since 1993, and especially the two accidents in 2006 where the seals failed and fatalities occurred: The Sago mine explosion, where 12 miners died, and the Darby No. 1 mine explosion, where 5 miners died. It is reasonable to assume that if the ETS had been in effect, all 17 of these miners' lives might have been saved. Fourteen of these lives might have been saved

---

2 *See*, OMB "Guidelines For Ensuring And Maximizing The Quality, Objectivity, Utility, And Integrity Of Information Disseminated By Federal Agencies; Republication." 67 Fed. Reg. 8452 (February 22, 2002). *See also,* Guidelines For Ensuring And Maximizing The Quality, Objectivity, Utility, And Integrity Of Information Disseminated By The Department Of Labor," October 1, 2002. 67 Fed. Reg. 61669.

3 *See, e.g.,* OMB Guidelines definition of "quality" meaning "an encompassing term comprising utility, objectivity and integrity," and "[i]f data and analytic results have been subjected to formal, independent, external peer review, the information may generally be presumed to be of acceptable objectivity." 67 Fed. Reg. 8459.

> by the [Emergency Mine Evacuation ETS[4]]. However, three of the miners that [sic] perished in the Sago and Darby accidents died immediately from the explosion impact. They could not have been saved by the emergency mine evacuation [ETS]. For purposes of estimating benefits, MSHA attributes the saving of three miners' lives to this [Seals] ETS and *splits the remaining 14 lives* between this ETS and the 2006 emergency mine evacuation [ETS]. Hence, MSHA attributes the saving of 10 lives to this [Seals] ETS.

(Emphasis added).

This analysis is not well founded. Even should there be some rationale for the Solomon-like splitting of the remaining 14 lives (and there is none), as we stated in our September 17, 2007 comments, the *design* of the seals used at both the Sago and Darby Mines was not established as the cause of the deaths of *any* miners killed in those explosions. MSHA's accident reports focused on construction deficiencies at the seals at both of these mines. Furthermore, as we said in our September 2007 comments, the Darby Mine explosion resulted from miners attempting to cut a metal strap on the inby and outby side of a previously constructed seal. In short, Alliance submits that MSHA's attribution of ten lives that could have been saved if the Seals ETS had been in place at the time of the Sago and Darby accidents is wholly unfounded.

As for the compliance cost analysis of the REA, Alliance believes that MSHA has severely understated them. Thus, for example, we note that the REA states, at page 12, that the "cost of the ETS for all underground coal mine operators will be approximately $39.7 million per year."[5] In our judgment, that estimate is wildly understated. We say this because our Seals ETS-compliant seals of choice are lightweight concrete plug seals, the cost of which are driven by the size of the mine opening in which they are constructed. The smallest lightweight concrete plug seals cost $12,000, and the largest ones we utilize are in the range of $25,000 or more. On average, the cost of the seals that we use are in the $15,000 to $20,000 range for turnkey seal construction. Being mindful that our pre-Seals ETS Mitchell Barrett

---

4 71 Fed. Reg. 12252 (March 9, 2006).

5 *See also*, Table IV-2: Yearly Cost Per Underground Coal Mine, which states that the yearly cost per mine for all underground coal mines for compliance with the Seals ETS is $59,191. This amount is grossly understated based on our experience with the Seals ETS to date.

seals cost between $2,500 and $5,000, a reasonable number for the increase in our construction cost is $15,000 per seal. Prior to publication of the Seals ETS, our company-wide mine plans called for construction of approximately 400 seals per year. The total approximately $6 million cost for construction of those seals is about 15% of MSHA's total costs for all mine sizes, even though our annual coal production represents less than 7% of the total underground coal production for all mine sizes in the United States. Thus, it appears to us that MSHA has missed the actual cost of compliance with the Seals ETS by a very substantial margin.

Technological and Economic Feasibility of Constructing Seals Meeting the PSI Overpressures Should the COE Draft Report and/or the NIOSH Seals Report Serve as the Basis for MSHA PSI Overpressure Requirements –

We discuss the enormous variance in the compliance costs identified in MSHA's REA for two purposes: (1) to demonstrate the extraordinarily – indeed arbitrarily – conservative nature of MSHA's analysis for the costs of compliance with the Seals ETS; but also (2) to use that conservative estimate as context for the costs of compliance should the Agency somehow seriously consider publishing a final standard for sealing of abandoned areas in underground coal mines based on the findings of the COE Draft Report and/or the NIOSH Seals Report.[6]

To begin, we are entirely uncertain as to how such a seal (assuming a 640 psi overpressure requirement) could be constructed. We do not believe it would simply be a matter of scaling, for example, a 120 psi lightweight concrete plug seal to make it stronger. Thus, while it *might* be (we do not know that it is) possible to construct a structure capable of withstanding 640 psi, it would be nearly impossible to anchor it into the coal seams in our mines (let alone any other coal seam in the United States of which we are aware), given the constraints of our room and pillar geometry. Theoretically and simply put, such a seal would be effectively much stronger than its surrounding strata. However, hypothetically, if calculations for the lightweight concrete plug seal design we use are carried out, it would produce a linearly proportional relationship between strength and cost. Thus, a 640 psi overpressure lightweight concrete plug seal would be about 5.3 times more costly than a 120 psi overpressure lightweight concrete plug seal. This calculates out to a cost for such seals of approximately $100,000 each. We submit that the economics of $100,000 seals would be virtually certain to prevent seals from ever being constructed in underground room and pillar mining, with a resulting introduction of

---

[6] As we state in our comments, we firmly believe that MSHA would not be justified in setting such requirements.

significant safety and health hazards due to enormously increased ventilation requirements.

Being mindful that the standard-setting requirements of § 101 of the Federal Mine Safety and Health Act of 1977 (the "Mine Act") include consideration of the economic and technological feasibility of standards, Alliance believes that such feasibility considerations preclude MSHA from adopting the kinds of psi overpressures identified in the COE Draft Report, as well as the NIOSH Seals Report.

MSHA's Continuing Arbitrary and Confusing Implementation and Enforcement of the Seals ETS –

In our September 17, 2007 comments, Alliance expressed grave concerns that MSHA's implementation and enforcement of its seals standards were resulting in nation-wide chaos and confusion. While there have been some modest incremental improvements since this past September, Alliance remains very concerned about this problem. Indeed, for us the problem remains of such a magnitude that Alliance's mines are being permitted by MSHA to build 120 psi overpressure seals in some MSHA districts, when in other MSHA districts our seal construction plans have not even been approved yet. Thus, for example, at one of our underground mines a training plan, seals protocol, and action plan were provided to MSHA this past June. Since that time it has been resubmitted five additional times, with information being removed due to MSHA's request and then added back in again at MSHA's request. We have addressed every issue at every juncture; but we continue to be told to provide additional information. Our most recent, and sixth, submission was made on November 5, 2007. To date, we have heard nothing further from the Agency. In sum, at this mine, we heave been working, in vain, for well over 200 days in an effort to obtain an approved training plan, seal protocols, and action plan as required by the Seal ETS.

We have also experienced unexplained shifts on the part of MSHA field personnel in connection with the meaning of the term "affected area" in 30 C.F.R. § 75.335(b)(4)(ii). Thus, for example, at another of our mines, an MSHA field office official telephonically insisted that we change the affected area of a seals set, and then told us to come to the MSHA district office to change our action plan accordingly.

At one other of our mines we are having a disagreement with MSHA involving the meaning of the language "except those persons referred to in section 104(c) of the Act" contained in 30 C.F.R. § 75.335(b)(4)(ii). In this situation, MSHA district officials have adopted what we believe is a restrictive and unsafe policy that

would prohibit our mine examiners from carrying out their legal duties. Thus, under the Seals ETS, in circumstances where miners are to be withdrawn from the affected area, "except those persons referred to in section 104(c) of the Act," the district policy is that the only examinations permitted within the affected area are the pre-shift and on-shift examinations at the locations where miners are working to correct the condition within the affected area. The district's view is that no mine examiners are permitted to travel inby the affected area to conduct their examinations until the allegedly hazardous condition has been corrected. Alliance respectfully disagrees with this position for the following reasons. First, based on the clear meaning of the referenced section of the Mine Act, MSHA is not the sole arbiter of the persons included in the phrase in the Seals ETS "except those persons referred to in section 104(c) of the Act." A mine operator has clear legal authority to identify such persons, and in our view, our mine examiners are individuals vitally important to fulfill this requirement. Furthermore, we need not have MSHA's approval for this purpose.

We say this because Mine Act § 104(c)(1), in describing those persons who shall not be required to be withdrawn from or prohibited from entering any area of a mine subject to a Mine Act § 104 withdrawal order, specifies that the provision covers "any person whose presence in such area is necessary, in the judgment of the operator *or* an authorized representative of the Secretary, to eliminate the condition described in the order." (Emphasis added). In addition, preshift examiners (described in 30 C.F.R.§ 75.360) and weekly examiners (described in 30 C.F.R. § 75.364), by the very terms of these regulatory provisions, should not be limited to conducting their mandatory examinations in areas outby the "affected area" specified in § 75.335(b)(4)(ii) of the Seals ETS. To so restrict these examiners could result in development of serious safety problems inby the affected area. We think that, in order to keep the entire mine safe, consistent with 30 C.F.R. §§ 75.360 and 75.364, we are obligated to have our examiners make their mandated examinations inby the affected area in order to identify potential hazards. Finally, the apparent position of the MSHA district that the "affected area" includes all inby areas of the mine is a *de facto* enormous expansion of the phrase "affected area" as used in the Seals ETS – and one that is patently unreasonable. In short, we have every right under the Mine Act to have our examiners be present underground, not only to carry out their mandated examination duties, but also because they are individuals who, in our judgment, are necessary to eliminate any hazards in question.

Related to our aforementioned concerns about the meaning of "except those persons referred to section 104(c) of the Act," we are very disturbed about MSHA's apparent advancement of the incorrect theory that the presence of methane behind seals in the explosive range should be categorized as a *per se* imminent danger. MSHA has advanced this argument in two recent cases before ALJs of the Federal

Mine Safety and Health Review Commission arguing that an explosive mixture behind a seal is, *de facto,* an imminent danger warranting withdrawal of all persons from the mine. *Jim Walter Resources, Inc. v. Secretary of Labor*, Docket No. SE 2007-307-R (Nov. 16, 2007) and *Consol of Kentucky, Inc. v. Secretary of Labor*, Docket No. KENT 2007-351-R (Jan. 10, 2008). In both cases, the Commission's ALJs have concluded that the mere existence of an explosive range behind the seal is not sufficient to justify the issuance of an imminent danger withdrawal order. We believe that these decisions are correct as a matter of law, science, and common sense, and that MSHA's burden of establishing that an imminent danger actually exists before it issues a Mine Act § 107(a) order must be more than a theoretical possibility of danger.

Conclusion

In conclusion, Alliance appreciates the opportunity to submit these supplemental comments on the Agency's Seals ETS. As MSHA works toward final publication of the Seals ETS, we urge the Agency to carefully consider the enormous implications of unnecessary and overreaching requirements for sealing of abandoned areas in underground coal mines. Should MSHA promulgate a final standard that makes it technologically or economically infeasible for Alliance and other underground coal mine operators to build mine seals, the consequences (albeit unintended) of such an outcome would be to introduce wholly unnecessary safety and health hazards into the underground working environment because of the need for enormously increased ventilation and its concomitant impact on the levels of methane, respirable coal dust, and other gases and dusts to which our miners would be exposed.

Sincerely,

Thomas M. Wynne

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

From: Green, Edward [mailto:EGreen@crowell.com]
Sent: Friday, January 18, 2008 5:57 PM
To: zzMSHA-Standards - Comments to Fed Reg Group
Cc: Silvey, Patricia - MSHA
Subject: RIN 1219-AB52; Comments of Alliance Coal, LLC on Reopening of the Seals ETS

Attached please find the Supplemental Comments of Alliance Coal, LLC on MSHA's Emergency Temporary Standard for Sealing of Abandoned Area in Underground Coal Mines: RIN 1219-AB52.

Edward M. Green, Esq.
Crowell & Moring LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2922 - Direct
(202) 628-5116 - Fax
(202) 236-3358 - Cell Phone
egreen@crowell.com