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RE: RIN 1219-AB53

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MSHA
Office of Standards, Regulations, and Variances
1100 Wilson Blvd., Room 2350
Arlington, VA 22209-3939

Re: RIN 1219-AB53, Rescue Teams

Thank you for the opportunity to submit these comments regarding the above-styled rulemaking for mine rescue teams. I submit these comments on behalf of the West Virginia Mine Safety Project of the Appalachian Center for the Economy and the Environment. The Appalachian Center is a regional, non-profit law and policy organization. The West Virginia Mine Safety Project offers direct legal assistance to West Virginia coal miners regarding workplace health and safety matters and advocates for protective mine health and safety standards.

As with previous comments to MSHA, we submit these comments mindful of Congress's overarching mandate that MSHA is to undertake its regulatory and enforcement duties with miners' safety and health foremost in mind. After all, "Congress declares that the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a).

Indisputably, rescue team members hold miners' well-being in the highest regard. Often, rescue team members are volunteers, and their toil and training frequently go unnoticed. They are among the very first to respond in an emergency, and give selflessly and tirelessly when called upon. We need only to recall the recent tragedy at Crandall Canyon as an illustration of the gravity of rescuers' work and their willingness to sacrifice everything when disaster strikes. The past couple of years have been among the most tragic in recent times for coal miners, their families, and their communities – and highlight the need for a robust network of mine rescue teams. After all, coal miners should be able to expect that operators will provide well-trained mine rescue teams should such teams be needed for any reason. Similarly, rescue team members themselves should be able to expect that operators will provide top-notch training and will provide other well-trained teams to be on standby if a rescue team itself needs assistance while responding to an emergency. Thus, it is well past time for MSHA to revise its regulations governing rescue teams so that the mining community can maximize – and enhance, where possible – the talents and services of mine rescue teams.

As with many other proposed enhancements of health and safety standards that would benefit their employees, coal operators seem to cry foul about this rule in several respects. For example, operators complain about: (1) the requirement that rescue stations be located within one hour of

ground travel time from the mine(s) they serve, (2) the requirement that rescue team members train at each mine which they cover, (3) the requirement that rescue teams participate in two local mine rescue contests per year, and (4) the definition of a "small" mine being a mine with 36 or fewer miners, as opposed to some other number. However, in promulgating its final rule, MSHA cannot give leeway on any of these requirements, as each of these provisions is set forth straightforwardly in the MINER Act of 2006, as are a number of other provisions.

As to the one-hour travel requirement, the MINER Act straightforwardly mandates that MSHA must promulgate a regulation requiring that mine rescue team members be "available at the mine within one hour ground travel time from the mine rescue station" for mines employing more than 36 employees. 30 U.S.C. § 825(e)(2)(B)(iii)(I)(bb)(DD). The same one-hour requirement exists for mines employing 36 or fewer employees. 30 U.S.C. § 825(e)(2)(B)(iv)(II)(dd).

As to the requirement that rescue teams must train at each mine they cover, the MINER Act straightforwardly mandates that, for mines with 36 or more employees, MSHA must promulgate a regulation requiring mine rescue teams to "participate at least annually in mine rescue training at the underground coal mine covered by the mine rescue team." 30 U.S.C. § 825(e)(2)(B)(iii)(I)(bb)(CC). A similar requirement applies to mines with 36 or fewer employees. 30 U.S.C. § 825 (e)(2)(iv)(II)(cc).

As to the requirement that rescue teams must compete in local contests, the MINER Act straightforwardly mandates that, for mines with 36 or more employees, MSHA must promulgate a regulation requiring mine rescue teams to "participate at least annually in two local mine rescue contests." 30 U.S.C. § 825(e)(2)(B)(iii)(I)(bb)(BB). The same requirement applies to mines with 36 or fewer employees. 30 U.S.C. § 825 (e)(2)(iv)(II)(bb).

As for 36 being the number of employees as the threshold for a mine being "large" or "small" for purposes of rescue team requirements, the MINER Act straightforwardly delineates between requirements for operators "of each underground coal mine with more than 36 employees," 30 U.S.C. § 825(e)(2)(B)(iii) (emphasis added), and operators "of each underground coal mine with 36 or less employees." 30 U.S.C. § 825 (e)(2)(iv) (emphasis added).

Under a seminal decision by the Supreme Court of the United States, administrative agencies have no leeway in interpretation and enforcement when a federal statute directly addresses the issue at hand. "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. N.R.D.C.*, 467 U.S. 837, 842-843 (1984).

As to the issues of one-hour travel time, training at each covered mine, participation in local mine rescue contests, delineation between small and large mines, and other issues raised by the proposed rule, as explained above, Congress spoke very clearly as to these requirements in the MINER Act. Thus, under *Chevron*, MSHA has no latitude, for example, to exempt existing mine rescue stations from the one-hour travel requirement. MSHA cannot allow substitution of some other training for participation in local mine rescue contests or exempt rescue teams from training at each mine they cover. MSHA cannot tinker with the threshold of what constitutes a small or large mine for purposes rescue team requirements.

The proposed regulation raises a number of other issues, as well. For instance, the proposed rule at 30 C.F.R. § 49.18(b) would increase the annual training requirement for team members from 40 to 64 hours. 72 Fed. Reg. 51320, 51323 (Sept. 6, 2007). However, as MSHA notes, the Mine Safety Technology and Training Commission report "Improving Mine Safety Technology and Training: Establishing U.S. Global Leadership" (2006) actually recommends that rescue team members receive 96 hours of training annually – almost 2.5 times the amount of training required under the existing rule. 72 Fed. Reg. at 51325. Moreover, this 96-hour (8 hours per month) recommendation is a "bare minimum." Commission Report at 51. "[A]s a practical matter, adequate preparation for contests alone demands at least this level of commitment. The better teams already surpass this requirement." *Id.* Inexplicably, MSHA does not propose to fully adopt this recommendation, but instead puts the burden on those commenting on the proposed rule to explain how an amount of training different than the proposed 64 hours is necessary. Rather, the burden is on MSHA – as the longstanding, Congressionally-mandated governmental guardian of miners' everyday and long-term health and safety – to explain why it is not adopting a "bare minimum" recommendation made by a commission – created by the industry, no less – comprised of a cross-section of labor, industry and academia, especially when accomplished rescue teams already exceed this amount of training. For MSHA to conclude otherwise may well be an action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

The proposed rule also is troublesome in that it would vest discretion with operators in key respects. For instance, the MINER Act requires that "an employee knowledgeable in mine emergency response" be present at each shift at each underground mine. 30 U.S.C. § 825(e)(2)(B)(iii)(I)(aa), 30 U.S.C. § 825(e)(2)(B)(iv)(I). Accordingly, MSHA proposes to amend C.F.R. § 75.1501(a) such that a "responsible person" as defined therein also have knowledge about the mine's Emergency Response Plan and Mine Rescue Notification Plan. 72 Fed. Reg. at 51324. MSHA also would require that this person receive annual training in mine emergency response coordination and communication. While this may be a laudable goal, it falls short in that MSHA does not go on to prescribe the duration or quality of such training. MSHA leaves to the operator's discretion that such training will be "appropriate to the unique conditions of the mine and the experience of the miner being trained." *Id.* However, we have seen from recent mine tragedies how critical it is for those at rescue sites to have thorough knowledge in this regard. For MSHA to just leave it to "the operator to assure that the responsible person is adequately prepared to respond appropriately to mine emergencies" – where experience shows that operators easily can gloss over such requirements when MSHA is not prescriptive in its approach – is only asking for complications if or when another tragedy strikes and rescue teams must be deployed. MSHA itself should examine each mine to determine and prescribe the minimum amount and type of training required in this regard.

There is a similar problem with vesting discretion in operators in proposed 30 C.F.R. § 49.20(a)(1). Under the MINER Act, rescue team members must be "familiar" with the operations of the mines they cover. 30 U.S.C. § 825(e)(2)(iii)(I)(bb)(AA), 30 U.S.C. § 825(e)(2)(iv)(II)(aa). However, "MSHA is not proposing a minimum amount of time for mine rescue team training underground at covered mines. MSHA expects the operator to evaluate each team member to determine the amount of training necessary for that person to become familiar with the operations at the covered mine." 72 Fed. Reg. at 51324. Therefore, operators easily could require only cursory familiarization with covered mines, which could pay disastrous dividends if a rescue team is deployed to a mine in an emergency. If the minimum amount of time necessary for familiarization really is so variable, then MSHA itself should examine each

mine to determine and prescribe the minimum amount of time needed to familiarize rescue team members with the mines they cover.

On a related note as to operator discretion, both the existing and proposed regulation allow that "miners who are employed on the surface but work regularly underground shall meet the experience requirement." 30 C.F.R. § 49.12(c). However, there is no explanation of what it means to work underground "regularly." Such a lack of specificity may well permit an operator to field rescue team members who do not have sufficient exposure to an underground mining environment to be effective rescue team members. With this reexamination of its mine rescue team regulations, MSHA has an opportunity to more easily revisit such provisions to make them more protective of miners, and should take advantage of such an opportunity to spell out what constitutes "regular" underground work.

Turning to requirements for mine rescue contest judges, MSHA requests comment on whether contest judges should undergo an minimum amount of annual training. 72 Fed. Reg. at 51326. MSHA should require contest judges to undergo the same annual training as rescue team members themselves, if judges are to be fair and accurate decision-makers when rescue teams display the skills that they work so diligently to hone.

On another issue, MSHA attempts to give operators small mines (36 or fewer employees) latitude in a couple of respects such that miners who happen to work at smaller mines are not afforded the same level of protection as those working at larger mines. For instance, "MSHA invites comment regarding the types of teams that are available to mines having 36 or fewer employees who could qualify to be a mine rescue team member and whether these mines should be able to use other types of teams, such as teams consisting of one miner per covered mine." 72 Fed. Reg. at 51325 (emphasis added). MSHA's tenor here is that small operators do not have enough resources to field the required rescue teams in one form or another. This is indefensible. If operators large or small are unwilling to or incapable of providing such a fundamental safety net for their employees, then such operators should not be in business.

As previously noted, MSHA's present examination of its rescue team regulations presents an opportunity for systemic improvement so as to maximize the benefit of and build upon mine rescue teams' skills and dedication. MSHA also has the opportunity here to reward and encourage rescue team participation. However, MSHA's approach is myopic in that the agency clearly desires to only to deal with rescue team requirements set forth in the MINER Act and nothing more. For instance, nothing in this or related rulemaking indicating MSHA's willingness to observe rescue team training to assure that rescue team members receive the best possible instruction. Rather, it seems that MSHA merely examines training logs, a one-dimensional exercise of oversight.

In a similar vein, nothing in the proposed rule requires that operators continuously provide mine rescue teams with updated mine maps. Common sense suggests that the rapidly-changing layout of active coal mines makes it necessary for rescue teams to have up-to-date information about the mines they cover, if teams are to carry out their duties effectively. In addition, MSHA should be examining whether rescue team membership should be a full-time job, or at least consider making some of teams' leading posts a full-time job – which may alleviate burnout among some who participate as volunteers on top of other personal and professional obligations. Of course, operators of mines covered should bear the expense of mine rescue team members' full-time employment status in such positions. In any case, if full-time rescue team members are also employees of a company, then they should retain any

seniority rights, abilities to advance, pay raises, or any other advantages gained in the duration and quality of their service to a company the same as if they were not serving on a rescue team.

Finally, in the vein of systemic examination of rescue team regulations, there is a good suggestion by Mine Safety Technology and Training Commission that operators "should carry extended life insurance policies for every mine rescue team member so that families are not penalized for their voluntary sacrifices." Commission Report at 59. While we are not in a position at this time to suggest the scope or amount of such coverage for rescue team members, or to specify the economic impact for operators in providing such coverage, it is a timely suggestion that MSHA should explore in this rulemaking, especially in the wake of the Crandall Canyon tragedy that claimed three rescuers' lives.

Thank you for your consideration of these comments.

Sincerely,

Nathan Fetty
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