January 8, 2009

Ms. Patricia W. Silvey, Director
Office of Standards, Variances & Regulations
Mine Safety & Health Administration
1100 Wilson Boulevard, Room 2350
Arlington, VA 22209-3939

Re: Federal Register Notice of December 18, 2008 Concerning Issuance of Draft Program Policy Letter (PPL)--Guidance for Compliance with Post-Accident Two-Way Communications and Electronic Tracking Requirements of the Mine Improvement and New Emergency Response (MINER) Act

Dear Ms. Silvey:

These comments are submitted on behalf of the members of the National Mining Association (NMA) in connection with the notice that was published by MSHA in the Federal Register for Dec. 18, 2008 (73 Fed. Reg. 77,069), announcing the issuance of a draft Program Policy Letter (PPL) providing guidance for compliance with post-accident two-way communications and electronic tracking requirements under the Mine Improvement and New Emergency Response (MINER) Act. The Dec. 18 notice requested comments on the draft PPL by today, a bare three weeks after its publication.

As we advised MSHA by letter of Dec. 30, 2008 (attached), "issuance of the draft, immediately preceding the holiday season, has precluded operators and technology providers from having the discussions that are required in advance of preparing comments on the document." Thus, NMA wishes to advise MSHA that this letter constitutes our preliminary comments only. Furthermore, because of the extraordinary brevity of the comment period (especially with its intervening holidays), the experts of involved NMA member companies simply have not, as yet, been able to conclude their consideration and discussion of the draft PPL. Recognizing that the request for comments by today is not a formal deadline, NMA expects to provide you with our company experts' specific comments on the draft PPL in the next day or so. In addition, recognizing the complexity of this issue, we look forward to a much more deliberative and detailed dialogue with the agency in the months ahead on this very important subject.

This draft PPL will significantly impact how underground coal mine operators implement the post-accident communication and tracking requirements of the MINER Act at their operations. Although we appreciate having the opportunity to

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comment on the draft PPL, NMA is very disturbed about the manner in which the draft has been issued, especially what appears to be a rush to issue a final PPL without allowing for a careful and well-considered dialogue between the agency and its stakeholders on this critically important subject. NMA is not only deeply troubled by the haste with which MSHA seems to be bent on issuing this PPL (a haste which we believe violates both applicable statutory and executive order requirements as we discuss below), but we also believe the draft contains major substantive problems which must be corrected.

At the very outset, however, and overarching to our comments in their entirety, NMA wants MSHA to know that we fully agree with and endorse the statement in the December 18 notice that while "approved tracking systems are available ... fully wireless communications technology is not sufficiently developed at this time, nor is it likely to be technologically feasible by June 15, 2009." *Id.* Furthermore, the draft PPL repeats this conclusion, and, in addition, states that the draft "addresses acceptable alternatives to fully wireless communication systems" (*id.* at 77,070) and that since "fully wireless communication systems technology is not currently available ..., alternative means of using partially wireless two-way communication is warranted." *Id.* 77,072. Not only does NMA agree with these statements, but we also urge MSHA to understand it is for these very reasons that we feel so strongly about the need to move forward on this vital issue of concern in a manner firmly grounded in law. It is to this crucial issue that we now turn.

Comments on Statutory and Executive Order Defects

Thus, we must state our fundamental objection to the manner by which the agency has managed this most significant matter. To begin, NMA notes that the Dec. 18 Federal Register notice (at 73 Fed. Reg. 77,069-77,070) states that it was published under the authority of Executive Order (EO) 12,866, as amended by EO 13,422 (EOs), and the Office of Management and Budget's (OMB) Bulletin for Agency Good Guidance Practices. OMB Bulletin No. 07-02 (72 Fed. Reg. 3432 (Jan. 25, 2007)). NMA is a strong advocate of these EOs and the OMB bulletin. We note that this is the first time MSHA has ever published a draft PPL (or any other guidance document) using this process. In concept, we applaud MSHA for doing so because we have long advocated involvement of the mining industry and other stakeholders in development of important MSHA guidance documents.

Sadly, however, MSHA's initial foray into this important area is a misstep. Not only has the agency violated the EOs and the OMB Bulletin (as we shall discuss below), but NMA also must insist that the subject matter of the draft PPL cries out for rulemaking under the provisions of section 101 of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act). 30 U.S.C. § 801. In this regard, the agency itself has stated in the Dec. 18 notice that it "will consider initiating rulemaking [on the subject matter of the draft PPL] in the future." *Id.* NMA strongly urges that the time to initiate rulemaking is now. Therefore, we recommend that the draft PPL be withdrawn pending the publication of proposed improved mandatory safety standards under the authority of Mine Act section 101.

NMA has participated closely with MSHA in every facet of implementation of the MINER Act. In the other instances where MSHA felt compelled to issue PPLs or other guidance documents, NMA objected to them on the fundamental ground that Mine Act section 101 rulemaking was required. In most of these cases, MSHA ultimately turned to Mine Act section 101 rulemaking, i.e. refuge chambers, belt entry ventilation, mine rescue teams. We are mystified as to why, in this instance, the agency has chosen to utilize the "significant guidance document" procedures of the EOs and the OMB Bulletin in lieu of the rulemaking procedures of Mine Act. The technology-forcing nature of the post-accident two-way communications and electronic tracking requirements of MINER Act section 2 are so daunting that they cry out for the discipline and rigor of Mine Act section 101 rulemaking. After all, the MINER Act statutory provision is an amendment to Mine Act section 316 (30 U.S.C. §876), which itself is an "interim mandatory safety standard." *See* Mine Act section 301(a). 30 U.S.C. §861(a). We believe that the detailed and specific substance of the draft PPL is not only better suited to Mine Act section 101 rulemaking, but that Mine Act section 301(a) demands that it be so treated. Indeed, even a cursory examination of the mandatory safety standards in 30 C.F.R. Part 75 shows that MSHA's decades-long and proper practice has been to implement the interim mandatory safety standards in Mine Act Title III through the development and promulgation of improved mandatory safety standards under Mine Act section 101.

Thus, in this instance, use of the EOs and the OMB Bulletin, as well-intentioned as it may be to "respond", as MSHA says in the Dec. 18 notice to "operators' requests for guidance to assist them in implementing these requirements of the MINER Act in a timely and effective manner," (73 Fed. Reg. 77,070) is wrong. We say this because the process MSHA has chosen is devoid of a description of the basis for the decisions made by the agency; with insufficient time for any meaningful comment; no opportunity for formal notice-and-comment on the agency's proposal; and with no final agency action (rulemaking) which addresses and explains the agency's response to comments filed. By choosing this process, MSHA is depriving the mining community of the fundamental due process requirements afforded by law; and this constitutes, in our view, arbitrary and capricious agency action.

We are aware that Congress imposed stringent (three-year) deadlines on both MSHA and underground coal mine operators for implementation of this provision of MINER Act section 2. Similar, and indeed, more stringent deadlines were imposed for the agency to promulgate other MINER Act standards, i.e. sec. 2 Mine Rescue Teams; sec. 10 Sealing of Abandoned Areas; and sec. 11 Technical Study Panel (belt entry ventilation), yet the agency was able to discharge those responsibilities within the proscribed timeframes.

Of equal if not greater significance, the agency just completed a final rule for refuge alternatives for underground coal mines – a requirement derived, in part, from the same MINER Act section 2 that is the basis for this proceeding. Because MINER Act section 2 amends Mine Act section 316(b), and because section 316(b) is an interim

mandatory safety standard (pursuant to section 301 (a) of the Mine Act), the agency must follow the procedures mandated by the Mine Act for the development of improved mandatory safety standards pursuant to its authority under Mine Act section 101 through notice-and-comment rulemaking. MSHA must use these legally required rulemaking procedures when it promulgates mandatory requirements for MINER Act implementation.

In this regard, and critically important, let there be no mistake about the fact that, although MSHA has couched the draft PPL as a guidance document and has specifically stated in the Dec. 18 notice that "[m]aterial in the guidance does not constitute a regulation" (*id.* 77,069), NMA has absolutely no doubt that the reality in the field will be that vendors, mine operators, and MSHA coal mine safety and health enforcement personnel will consider and be governed by the notion that the PPL does indeed constitute what are the baseline standards for post-accident two-way communications and electronic tracking.

Not only is the agency legally mandated by Mine Act section 101 to develop, propose and promulgate improved mandatory safety standards in this area, but, as a matter of sound public policy and efficient government, doing so would avoid the real problems in the field identified above and would also enable the agency to more effectively bring the collective expertise of the mining community to bear on how best to safely and effectively implement the requirements for post-accident communication and tracking. NMA must insist, therefore, that the requirements of MINER Act section 2 be developed in full accord with the due process requirements of the Mine Act.

Even if it were appropriate for MSHA to use the significant guidance document procedures of the EOs and OMB Bulletin, MSHA has not complied with these procedures in material respects.

First, the EOs require, as a matter of principle that agency decisions be based on the "best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences" of the intended guidance document. *See* EOs at section 1(b)(7). Because MSHA has provided no meaningful explanation for the basis of its draft, the agency has failed to meet this requirement.

Second, in issuing guidance documents, MSHA is supposed to take into account "the cost of cumulative regulations." *Id.* at section 1(b)(11). MSHA has utterly failed to do this.

Third, agencies are supposed to draft guidance documents "to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty." *Id.* at section 1(b)(12). MSHA has missed the mark entirely in this respect.

Furthermore, the OMB Bulletin makes quite clear the importance of public comments and agency responses to such comments. Thus, with regard to public comments, the OMB Bulletin states that "pre-adoption notice-and-comment can be most helpful for significant guidance documents that are particularly complex, novel, consequential, or controversial." OMB Bulletin at 15. All of these criteria apply to the draft PPL: and it is basic that an adequate period of time for such public comment be set in order for successful implementation of the Bulletin. *See also*, OMB's "Memorandum for Heads of Executive Departments and Agencies, and Independent Regulatory Agencies," M-07-13, April 25, 2007. As we have said, the three-week comment period is woefully inadequate. As for agency responses to these comments, the OMB Bulletin is quite specific, stating as follows:

> After reviewing comments on a draft, the agency should incorporate suggested changes, when appropriate, into the final version of the economically significant guidance document. The agency should then publish a notice in the Federal Register announcing that the significant guidance document is available....*The agency also must prepare a robust response-to-comments document and make it publicly available*. Though these procedures are similar to APA notice-and-comment requirements, this Bulletin in no way alters (nor is it intended to interpret) the APA requirements for legislative rules under 5 U.S.C. §553.

OMB Bulletin at 17. (Emphasis added.) NMA wishes to point out that the OMB Bulletin fully supports (and essentially) demands a robust explanation of how agencies treat public comments; and also sets out clearly that the procedures are not substitutes for legislative rules, a statement as applicable to Mine Act section 101 rulemaking as it is to rulemaking under the APA.

Conclusion

Thus, for all the reasons listed above and in the specific comments that NMA will provide to MSHA in the next day or so, NMA urges that MSHA withdraw the draft PPL. NMA also urges that MSHA swiftly move to initiate a deliberative and detailed dialogue with us and other stakeholders in the months ahead with the goal of developing, and then, proposing and promulgating improved mandatory safety standards for post-accident two-way communications and electronic tracking under Mine Act section 101, in a fashion consistent with the time constraints of MINER Act section 2. NMA wishes to assure MSHA that we are committed to assisting the agency in this effort.

Sincerely,

Bruce Watzman
Senior Vice President
Regulatory Affairs