

Office of
Standards, Regulations,
and Variations

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U.S. Dept of Labor



February 27, 2003

Mr. Marvin W. Nichols
Director
Office of Standards, Variations & Regulations
MSHA
1100 Wilson Boulevard, Room 2313
Arlington, VA 22209-3939

Dear Mr. Nichols:

This letter is submitted on behalf of the members of the National Mining Association (NMA) in response to the Emergency Temporary Standard (ETS) that appeared in the Federal Register on December 12, 2002 (67 FR 76657). We appreciate the opportunity to provide comments on this initiative that is extraordinary, if for no other reason than the agency's decision to employ the rarely used ETS mechanism in promulgating this standard.

As you are aware, members of the National Mining Association produce the vast majority of coal that is produced in underground coal mines throughout our nation. As such, they are vitally interested in this proceeding as it will impact the response programs that they initiate in the event of a fire, explosion or gas or water inundation. At the outset we want to incorporate by reference the comments already submitted by RAG American Coal Holding, Inc and Energy West Mining Company, both of whom are members of NMA. These submittals identify concerns and questions shared by NMA members who are accountable for compliance with the ETS. For example:

- The ETS requires that the responsible person have "current knowledge of the assigned location and expected movements of miners underground" (emphasis added). This requirement while logical on-its-face will impose an unnecessary and, quite possibly, unattainable requirement on the responsible person. As the agency is well aware, the location and movement of person's underground, while desirable, is not always predictable. Circumstances do arise that require persons to be removed from their "assigned location" or to depart from their normal, "expected" movements. The agency needs to recognize this and provide flexibility to accommodate unanticipated situations.
- The ETS requires that in the event of an emergency, "Only properly trained and equipped persons essential to respond to the mine emergency may remain underground." While we support this conceptually, we are concerned that the failure of the ETS to define what constitutes "properly trained and equipped" will lead to confusion at a time when it can least be accommodated. We believe the final standard must provide guidance on this point.

- The ETS requires, “The responsible person shall initiate and conduct an immediate mine evacuation when there is a mine emergency that presents an imminent danger...” (Emphasis added). While the concept of “imminent danger” is contained within Section 107 of the Mine Act and has been addressed in matters before the Federal Mine Safety and Health Review Commission, the ETS fails to describe how this term will be defined for purposes of this standard. This will result in subjective determinations by representatives of the Secretary who review such decisions with the benefit of hindsight rather than at the time the situation presented itself.

These are three examples of the ambiguities introduced by the ETS. These issues, as well as others that are submitted prior to the close of the comment period, must be resolved if the standard is to fulfill its intended objective.

Issuance of this standard in the manner proposed has correctly been characterized as an “extraordinary measure”. (67 FR 76658) Indeed, in the 33 year history of the Mine Act the agency has, on only one other occasion, used the authority provided for in Section 101(b) to issue an Emergency Temporary Standard. In crafting this section the Congress believed that the regulatory authority must be provided a mechanism to “react quickly to grave dangers which threaten miners before those dangers manifest themselves in serious or fatal injuries or illnesses.” S. Rpt. 181, 95th Congress, 1st Session 23 (1977). It is the determination of the potential for “grave danger” that distinguishes the rulemaking authority under Section 101(b) from the traditional rulemaking authority that has become the common practice under Section 101(a). Even if one were to agree that the circumstances warranted immediate attention, the agency could have initiated some form of expedited rulemaking, at an earlier date, under the normal procedures rather than wait approximately 14-months following the latest incident that precipitated this action to issue the ETS.

Regrettably, unlike the agency, we do not believe that the facts presented in the preamble rise to the level to justify the issuance of an Emergency Temporary Standard. While our members are cognizant of the need to have mechanisms in place, and indeed have such mechanisms to respond in the event of an emergency, we do not find compelling evidence to document a regulatory gap so significant as to warrant the use of this “extraordinary measure”. Rather, we find ourselves confronting a situation where the agency promulgated an arbitrary deadline (January 13, 2003) for the submission of revised evacuation plans without having finalized the underlying rulemaking process. This has introduced confusion into an already delicate situation that might well frustrate rather than further the underlying objectives of the standard. Many operators still await District Manager responses to their plan submittals and it is quite likely that further revisions will become necessary once the rulemaking process is completed. This would not have occurred had the agency chosen to follow the traditional rulemaking procedures under Section 101(a) of the Act.

The ETS was promulgated in response to unfortunate events that resulted in a tragic loss of lives. The agency's review of its existing regulatory program is a proper and necessary component of a post-accident analysis to determine if regulatory gaps were a contributing factor in the event. In this case the agency has concluded that the existing regulatory structure contained in 30 CFR Part 75 is deficient. While we do not reject this conclusion, we are

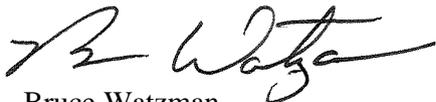
concerned that the issuance of the ETS implies that coal miners, in the absence of the ETS, were in grave danger – a proposition that we reject and that is not supported by the facts.

As the agency is well aware, operators of underground coal mines have been required, under § 75.110-23, to develop and submit to the District Manager for approval, “evacuation procedures to be followed in the event of an emergency.” These regulatory driven programs are supplemented by comprehensive, company specific emergency response programs that encompass, among other things, communication, training, response procedures, fire fighting and evacuation measures, and first responder and EMS components. Where necessary and when adhered to, these programs have proven to be successful and while all mine operators hope that they never have to implement these procedures, the detailed nature of these programs and the training that accompanies them has, in numerous instances, been proven successful.

In considering the requirements of the ETS we contrasted it with the time-tested programs that are currently in use throughout the underground coal industry. Rather than recognize the flexibility that miners and mine operators must exhibit when confronting an emergency situation, the ETS introduces concepts that are subjective and open to numerous interpretation. These, if left unresolved, have the potential to exacerbate the already difficult decisions that must be made when confronting an emergency situation.

The preamble that accompanies the ETS delineates the agency’s rationale for proceeding in the regulatory manner chosen. While we do not, as noted previously, share the belief that a “grave danger” existed warranting use of this extraordinary approach, we share the agency’s goal of providing a system that affords miners all of the protections possible in the event of an emergency situation. The members of NMA are committed to work with MSHA to develop a system that accomplishes this objective in as consistent and uniform a manner as is practicable.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Watzman". The signature is fluid and cursive, with a large initial "B" and "W".

Bruce Watzman