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James P. McHugh
Deputy Assistant Secretary for Policy,
Mine Safety and Health Administration
200 Constitution Ave. NW
Washington, DC 20210
Via regulations.gov

RE: Roof Control Plan Approval Criteria, Docket No. MSHA-2025-0072
Ventilation Plan Approval Criteria, Docket No. MSHA-2025-0084
Training and Retraining of Miners, Docket No. MSHA-025-0085

Dear Mr. McHugh:

The National Employment Law Project (NELP) and former OSHA Administrator and MSHA Deputy Administrator Douglas L. Parker submit these comments on the Mine Safety and Health Administration's (MSHA) Proposed Rules restricting MSHA's scope of review of roof control, ventilation and training plans in underground coal mines (collectively "mine plans"). NELP has for more than 55 years led the fight for a good-jobs economy, and worksite health and safety is a key cornerstone of any good job. Mr. Parker has served as Assistant Secretary of Labor for the Occupational Safety and Health Administration, Chief of Cal/OSHA, and in several roles at MSHA, including Deputy Assistant Secretary for Policy. Much of this commentary is based upon Mr. Parker's experiences and observations at MSHA.

We write in opposition to the proposed changes in the criteria for approval of training, roof control and mine ventilation plans. The proposed changes to the rules, 30 CFR 48.3, 30 CFR 75.222 and 30 CFR 75.371, are not required by law, as MSHA maintains; are vague and inadequately explained, raising significant APA concerns; and violate the Mine Act by diminishing miner safety and health, a question MSHA's proposal does not even address. For these reasons, we request that the proposal be withdrawn.

Approval of Training, Roof Control and Ventilation Plans

The purpose of MSHA review and approval of mine plans arises from the inherently dangerous environment in underground coal mines and the coal industry's tragic history of mine explosions and respiratory illnesses that have killed hundreds of thousands of coal miners over the course of our Nation's history. The vast majority of these deaths were preventable had the industry used adequate engineering controls and provided adequate training to miners. A key purpose of

the Mine Act has been to provide agency oversight over operator's use of training and engineering controls to ensure their effective implementation.

Unlike most workplaces, underground coal mines are in a constant state of change as mine sections are developed, coal is extracted, and those sections are sealed. When considered along with variables such as local geology, methane release, dust levels and composition, rates of water infiltration, mine depth, mine height, atmospheric pressure, the presence of old mine workings, etc., mine engineering to ensure protective ventilation and roof control systems is a complex and dynamic process that is unique from mine to mine. These variables can also create unique training needs.

For these reasons, MSHA is tasked with reviewing operator plans to ensure compliance with regulations. Because of the complexity of the mine environment, unique conditions from mine to mine, and the performance oriented nature of some of the Mine Act's requirements, there can be significant variability in mine plans.

Importantly, MSHA's role in approving plans is not just to check for written compliance with a specific set of requirements. Plan approval also involves ensuring that the means by which an operator plans to comply with regulations will meet industry standards, be effective, be reliable, have redundant mechanisms when necessary, and will protect miners under a range of anticipated, foreseeable, and low probability but potentially catastrophic conditions. The initial approval process includes physical inspection of the mine and review of the mine's safety and health record. It is not just a paper exercise. The approval process is informed by MSHA's knowledge of the mine and historic conditions in that mine, the coal seam where the mine is active, and the geologic conditions of the region.

The role of approving plans and requiring additional provisions when necessary to comply with regulations or ensure miner health and safety is the task of the District Manager. The District Manager's authority to impose additional requirements on a mine operator under 30 CFR 48.3, 30 CFR 75.222 and 30 CFR 75.371 are not, as the proposal suggests, "unfettered," nor are they "additional regulatory requirements." When MSHA requires additional provisions it is to ensure compliance with the requirements of Part 48 and Part 75 Subparts C and D, and to ensure that the operator's means of achieving compliance will be effective and reliable.

In the vast majority of cases, differences between the District Manager and the mine operator on plan contents and requirements are resolved informally. There is considerable back and forth, including consultation with technical experts within MSHA. Major questions regarding plan approval are often elevated to MSHA headquarters, especially when they involve questions of law or questions that have larger implications for compliance. If a plan issue cannot be resolved, mine operators have an opportunity to adjudicate MSHA's denial of plan approval before an administrative law judge.

MSHA Fails to Consider the Proposal's Effect on Miner Safety and Health

When MSHA removes or amends an existing health or safety standard it may not do so in a way that reduces protections to miners afforded by standards currently in place. Section 101(9) of the Mine Act states that "No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard." 30 U.S.C. Sec. 811(9).

Shockingly, MSHA has made no effort to evaluate or determine whether the proposed elimination of District Manager authority to require additional provisions in mine plans will impact miner safety and health. Nor does it explain or give examples of the types of mine plan provisions that could and could not be imposed. Subparts C and D of Part 75 contain multiple express references to District Manager's authority to require additional elements in a mine plan, and to permit lower than minimum requirements where mine operators can do so safely. The failure to analyze or explain how these provisions interact with the proposed changes to 75.222 and 75.371, as well as the failure to address the potential impact on miner health and safety, handicap the public's ability to comment meaningfully on the proposals and raise significant APA concerns.

The Appointments Clause is not Relevant to MSHA Rulemaking, and District Manager Discretion Does not Violate Due Process or the Administrative Procedures Act

MSHA claims that District Managers are not properly appointed under the Appointments Clause of the Constitution, *citing* Lucia v. SEC, 585 U.S. 237 (2018). This is not a legitimate basis for limiting MSHA's scope of review of a mine plan or limiting the current authority of a District Manager.

As an initial matter, while we do not agree that District Managers are not properly appointed, it is inappropriate for MSHA to use that as a pretext to weaken rules giving the District Manager authority to approve mine plans. It is within the power of MSHA, the Department of Labor, and the Administration to cure any Appointments Clause defect. In fact, in response to the Lucia case, DOL ratified the appointments of its own administrative law judges to avoid Appointments Clause concerns.[1] Among other possible solutions, DOL could ratify the appointments of its District Managers to cure any perceived defects. What it cannot do is weaken rules based upon alleged procedural defects that, if valid, are completely within its power to cure. Because any legitimate concern is within the government's ability to cure, the Appointments Clause issue does not provide a rational basis on which to alter MSHA mine plan regulations.

We do not believe there is a defect in the appointment of District Managers. The role played by District Managers in plan approval is factually distinguishable from the finding of fact and law made by the administrative law judges in Lucia. While District Managers have approval authority, their authority is not absolute, especially on major issues of cost or operational impact.

[1] https://www.dol.gov/agencies/oalj/topics/information/Proactive_disclosures_ALJ_appointments#:~:text=In%20anticipation%20of%20the%20Lucia,related%20decisions%20or%20other%20orders.

District Managers operate within a chain of command. In practice, mine operators can and do elevate major concerns regarding plan approvals to the directorate (headquarters) or higher level at MSHA if they cannot be resolved at the District level. District Managers' technical review and approval of mine plans do not have the same finality of the judges' findings in Lucia, and if mine plan approvals raise broader policy issues those policy issues are ultimately decided at the directorate level or higher.

Regarding MSHA's due process and APA (and Appointments) concerns, if a mine operator objects to a requirement a District Manager seeks to impose in a mine plan and the issue cannot be resolved, MSHA has a process by which the operator can have its day in court. In those circumstances MSHA will issue the mine operator a "technical violation." In that process, the mine operator may operate the mine using the contested mine plan (or if the safety risks are unacceptable to permit a mine plan's implementation, the operator can get an expedited hearing) while appealing to the Federal Mine Safety Review Commission, where an administrative law judge effectively reviews the District Manager's denial of the operator's mine plan. Through this procedure, operators have adequate due process protections against a District Manager seeking to impose requirements that exceed or conflict with MSHA regulations.

Moreover, the authority of MSHA to require provisions in a mine plan are not unfettered. The scope of the District Manager's discretion in reviewing the plan is to ensure compliance with minimum standards and ensure that the operator's plan to comply is effective and resilient enough to function to protect miners in the unique conditions of the specific underground mine under review. They may not require provisions outside of the scope of the rule. Nor do District Managers have the authority to create requirements that apply beyond the specific operation under review.

If there are specific concerns about how District Managers exercise authority, MSHA has not explained them in the proposals. MSHA's proposals give no examples or specifics about District Manager overreach in requiring additional provisions in a mine plan so the public can understand the concerns MSHA purports to address. The absence of any specifics about how District Managers' exercise of plan approval authority conflicts with the law raises significant APA and due process concerns about this rulemaking.

These Proposals Would Result in a More Burdensome Approval Process for Operators

MSHA review of mine plans plays an important role, not only in improving safety and health, but as a significant source of expert compliance and technical assistance for mine operators. If this proposal is enacted, a District Manager's role in plan approval would be limited to identifying inadequate plan provisions. The District Manager would not be able to request additional provisions to address deficiencies. It would be up to the operator to essentially guess what additional provisions would resolve the District Manager's concerns, resulting in a wasteful back and forth, delaying changes to mining operations and potentially resulting in the operator adding more complicated or expensive provisions to its plan than were needed to resolve MSHA's

concerns. The current iterative process is more efficient and effective in resolving differences and protecting miners.

Thank you for your consideration of these comments. We urge you to withdraw the proposal.