Comment of Stephen Turow, Esq. to MSHA's Federal Register Publication proposing modification to 30 CFR 75.222 (90 FR 28432, July 1, 2025)

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Docket No. MSHA-2025-0072

MSHA has published a proposed rule relating to the existing standard, Roof Control Plan and Approval Criteria, 30 CFR 75.222. The proposed change is to delete the second sentence 30 CFR 75.222 (a), which reads: "Additional measures may be required in plans by the District Manager."

As an attorney formerly employed by the United States Department of Labor, who represented MSHA and who worked regularly with the Agency to implement effective and appropriate roof-control, ventilation, and emergency response plans, I am well aware of the vital importance that these plans play in preventing accidents and protecting the health and safety of our Nation's miners. These plans also allow mines to operate more effectively by protecting miners and by helping to insure the physical integrity of coal mines, thus positively affecting coal production.

Specifically, with respect to roof-control plans, I am proud to have served during a period in which MSHA, in conjunction with mine operators and miners, was able to significantly reduce roof fall fatalities in coal mines – indeed, the United States experienced no coal mine roof-fall fatalities in 2016, a far cry from decades earlier when 100 or more annual fatalities were the norm. MSHA must not deprive miners and their families the protections accorded by 30 CFR 75.222, which provides a well-established and equitable means for addressing mine-specific geological conditions that could cause death or serious injury if not otherwise addressed through coordinated, cooperative efforts between MSHA, mine operators, and miners.

The Supplementary Information that accompanies the proposed rule states that under the current 75.222(a), "District Managers are granted nearly unlimited discretion to add additional measures to roof control plans" and that "this regulation essentially amounts to the unfettered ability of the District Manager to draft and create 'laws' which are civilly and criminally enforceable, without bicameral presentment, and with notice and comment rulemaking." The document also states that the effect of the proposed change would be to "decrease the burden currently faced by mine operators of having to revise their roof control plans to include plan requirements not specified in the statute or regulations…"

These statements misrepresent both the purpose of roof control plans and the process by which they are developed, evaluated, and approved. The process MSHA actually follows is firmly rooted in the statutory language, the legislative histories of the several Mine Safety and Health Acts, and more than 50 years of legal jurisprudence. This process has worked extremely well in achieving the goals of the Federal Mine Safety and Health Act of 1977, by greatly improving the mining industry's roof control safety record. It is not in need of change.

Roof falls killed approximately 50,000 underground coal miners during the last century. From the 1920's onward, roof control plans were at the center of the effort to combat this hazard. Roof control plans are necessary because geologic conditions and mining methods vary greatly from mine to mine, so no single set of rules could conceivably be appropriate for all. Mine-specific roof control plans can also be updated as conditions change or new technologies becomes available. Roof control plans were required in the first "Federal Mine Safety Code" which was promulgated when President Truman temporarily took possession of the mines in 1946, and they were included in the Federal Coal Mine Safety Act of 1952.

When Congress passed the 1969 Coal Mine Health and Safety Act, roof control plans were at the top of its list of new roof control regulations. The Legislative History of the Act states that roof control plans "should form the basis for systematic upgrading of all roof control practices in this industry."

While the 1969 Act specified that each mine operator had to develop a roof control plan "suitable to the conditions and mining system of each coal mine and approved by the Secretary," it did not specify how disputes about the content of the plan would be resolved. The details were filled in by a series of court cases over the next few years. In a D.C. Circuit Court opinion, *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398 (D.C. Cir. 1976), the Court held that requirements of duly adopted plans are enforceable as mandatory standards. However, the Court specifically addressed concerns that plan provisions were not enacted by the normal rulemaking process. It found that operators were afforded other protections in the creation of plan provisions, namely that the operator plays a coequal role in the development of the requirements of a plan. The Court explained as follows:

> The statute makes clear that the ventilation plan is not formulated by the Secretary, but is "adopted by the operator." While the plan must also be approved by the Secretary's representative, who may on that account may have some significant leverage in determining its contents, it does not follow that he has anything close to an unrestrained power to impose terms.

The Court further allayed legal concern regarding MSHA's ability to "use the ventilation plan as a vehicle for avoiding more stringent procedural [rulemaking] requirements" by recognizing a "more significant restriction on the Secretary's power" – i.e., the requirement that plan provisions identified by MSHA must "deal with unique conditions peculiar to each mine." The Court concluded with the recognition that Congress, in legislating mining plans for coal mines, did not intend to "impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine."

When Congress passed the 1977 Mine Safety and Health Act, it "noted with approval" that:

> [I]ndividual mine plan adoption and implementation procedures have been sustained by the federal Court of Appeals for the District of Columbia circuit (*Ziegler Coal Company v. Secretary of the Interior*, 536 F. 2d 398, (1976)). Thus, the Committee fully expects the individual mine plan technique to continue to be utilized by the Secretary in appropriate

> circumstances. The Committee cautions that while the operator proposes a plan and is entitled, as are the miners and representatives of miners, to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan. (Legislative History of the 1977 Mine Health and Safety Act, Senate Report No. 95- 181, 1977)

Congress further noted that "individually tailored plans, with a nucleus of commonly accepted practices, are the best method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like." Id.

Congress returned to the topic of plans in its deliberations on the 2006 Miner Act. It stated:

> Roof and ventilation plans are periodically revised to reflect changes in the physical structure of the individual mine and any relevant advancements in technology or technique. They are forward-looking, and their formulation requires that potential problems or issues be anticipated and planned for in advance. Additionally, their formulation and approval is, in most instances, a cooperative process that is traditionally guided by practicality, flexibility and front-line expertise. [109th Congress, 2d Session, Report 109–365, Senate Committee on Health, Education, Labor, and Pensions]

In a 2013 decision, *Mach Mining vs Secretary of Labor*, Case No. 12-3598 (7th Cir., 2013), the 7th Circuit Court upheld the "bifurcated structure" for ventilation plan review established by Congress, stating that:

> After a process of dialogue and negotiation with the mine operator, the Secretary must make an independent judgment that the ventilation system for a particular mining site is safe for those who will work there. Although specific to a certain mine and susceptible to more frequent alteration as conditions in the mine change, the process is essentially one of setting standards, not, in many ways, substantially different from setting more lasting and general standards through the rulemaking process.

This history makes clear that MSHA District Managers have never had "unlimited discretion" and "unfettered ability" to add measures to roof control plans. Instead, the plans are expected to – and, in my experience, do in fact -- emerge from a process of good-faith negotiation with give-and-take and valuable information sharing. In most instances, the plan and any changes are originally proposed by the mine operator. On those occasions when MSHA does find that provisions of a mine plan are unsuitable to the particular conditions at the mine, it follows the "established Agency procedures" outlined in its Policy and Program Manual, which is consistent with the procedure established almost 50 years ago by the Interior Board of Mine Operations Appeals – an independent adjudicative body -- in the *Bishop Coal Company* decision (November 18, 1975):

> Written notification from the District Manager to the operator which states that changes are needed in the plan, identifies the reason why changes are needed, affords the operator

an opportunity to meet with District personnel to discuss any proposed changes, and sets a reasonable time for the operator to submit revised plan provisions to the District.

Should the parties not be able to negotiate an agreement on plan provisions, a dispute resolution process was built into the 1977 Mine Act. It begins with the issuance of a "technical violation," not, as the Federal Register states, an issuance for which "mine personnel may be held personally liable, civilly and criminally …." Rather, the technical violation is merely a vehicle for permitting review and decision by an Administrative Law Judge (ALJ) from the Federal Mine Safety and Health Review Commission. The Senate Report on the 1977 Act stated that the purpose of vesting adjudicative authority in the Commission was to have "completely independent adjudicatory authority" (S. Rep 95-1981 at 47). At the hearing before the ALJ, MSHA has the burden of proving that the District Manager's request was not arbitrary and capricious. Either party may then appeal that decision, first to the full Commission, and then to an appropriate United States Court of Appeals.

It should be clear that, far from being a "burden," the whole point of roof control plans is to include "plan requirements not specified in the statute or regulations" when mine-specific conditions demand such requirements for the safety of miners. The criteria that are listed in 75.222 are some best practices from 1988, the year that the regulation was promulgated. They were never required, which is why they are written with the word "should" rather than "shall." They were only meant to be "considered on a mine-by-mine basis." The field of roof control is so "complex" and "multi-faceted," and the conditions, mining methods, and hazards are so various that roof control plans must be tailored to individual mines. Moreover, as conditions change, and as new technologies are developed, flexibility is essential.

The proof of the success of roof control plans is apparent in the fatality record. A miner today faces a risk of death from a roof fall that is approximately one-thirtieth ($1/30^{th}$) of that faced by a miner before the 1969 Mine Act. The roof control plan submission and review process can claim a significant portion of the credit for this astonishing improvement. There is no need to change that process; indeed, there is good reason to conclude that the proposed revision will diminish the effectiveness of coal mine roof control efforts, resulting in increased injuries and fatalities for the Nation's coal miners.